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A TREATISE

ON THE LAW OF

PRIVATE CORPORATIONS

BY

WM. L. CLARK

AND

WM. L. MARSHALL

IN THREE VOLUMES
VOL. I

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PREFACE.

In this work the authors have attempted to do what they believe has never been thoroughly done before, namely, to cover the whole field of what is properly the law of private corporations. Whether they have succeeded or not must be determined by the profession who will use the work, but certainly some branches of this subject are here treated for the first time, and others much more fully than in other works.

Particular attention is called to Consolidation and Reorganization (chapter 18); Dissolution (chapter 17); Statutory Classification (chapter 2); The Effect of Irregularities in Organization, and of Failure to Incorporate, which includes the Doctrine of De Facto Corporations, and Estoppel to Deny Existence (chapter 4); Powers (chapters 7-11); Effect of Ultra Vires and Illegal Transactions (chapter 12); and Legislative Control (chapter 15). Chapter 20 contains a very full treatment of the law in relation to watered or fictitiously paid up stock. Chapter 16 covers quite fully the principles of law in relation to taxation and exemptions.

The table of contents in the front of each volume is a minute analysis of the whole subject. It not only gives a comprehensive scope of the subject, but also enables the reader to turn readily to the particular section or subsection in which any given point is treated. It is an analytical index.

Great care has been taken to treat, under particular black letter lines, such matters only as properly belong there, and the analysis, therefore, may, it is believed, be relied upon as an accurate guide. This, in connection with the table of contents and the very full index, should be appreciated by the busy law-

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yer who desires to find just what he is searching for, with the least possible delay.

In this work an attempt has been made to make the citation of cases absolutely exhaustive on all points as to which there is any doubt; but on points settled beyond all controversy, sufficient only of the clearest and best-reasoned cases to establish the point have been cited, and a very large number of merely cumulative citations have been excluded after careful examination. In the citation of cases, specific reference has been made to the selection of cases on private corporations by Prof. Jeremiah Smith, Prof. William Keener, and Prof. G. M. Cummings. References are also given to the American Decisions, Reports, and State Reports.

Wm. L. Clark.
Wm. L. Marshall.

(New York, October, 1901.)

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I. In General.

§ 1. Definition and elements.—A corporation is a body, or artificial person, consisting of one or more individuals, or sometimes of individuals and other corporations,[1] created by law, and invested by the law with certain legal capacities, as the capacity of succession, and the capacity to sue and be sued, to make contracts, to take, hold, and convey property, to commit torts and crimes, and to do other acts, however numerous its members may be, like a single individual.[2]

A corporation, therefore, when it consists of more than one member, as is now almost universally the case, may be regarded, according as the one view or the other may be necessary, either (1) as a legal body or entity, in which the existence of the natural persons who compose it is merged, or (2) as a collection or association of natural persons, vested with the capacity of existing and acting as a body.

(1) As a body or legal entity, it is distinct from the members who compose it,[3] and as such has

(a) The capacity of succession, which is the capacity to exist as the same body for any length of time, notwithstanding the death, withdrawal, or change of members.

[1] "A corporation aggregate * * * is an artificial intellectual being, the mere creature of the law, composed generally of natural persons in their natural capacity; but may also be composed of persons in their political capacity of members of other corporations." Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 393. See post, § 45.

[2] See 1 Bl. Com. 467, 468; 1 Inst. 202, 250; 1 Kyd, Corp. 13; Bacon's Abr. "Corporations" (A); 2 Kent's Com. 267; Pollock, Jurisp. 112; 1 Shouler, Pers. Prop. (3d Ed.) § 215; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Cum. Cas. 490, 2 Smith's Cas. 622, 1 Keener's Cas. 139; Conservators of the River Tone v. Ash, 10 Barn. & C. 349, 1 Cum. Cas. 23; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1; Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Smith's Cas. 9, 1 Cum. Cas. 5; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Cum. Cas. 26, 1 Keener's Cas. 9, 1 Smith's Cas. 1; Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 1 Keener's Cas. 20; Reg. v. Arnaud, 16 Law J. Q. B. (N. S.) 50, 1 Cum. Cas. 30, 1 Keener's Cas. 28; Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131, 1 Smith's Cas. 33, 1 Cum. Cas. 38, 1 Keener's Cas. 33; Gallagher v. Germania Brewing Co., 53 Minn. 214, 1 Smith's Cas. 37, 1 Keener's Cas. 36; Foster v. Commissioners of Inland Revenue [1894] 1 Q. B. Div. 516, 1 Keener's Cas. 41, 1 Smith's Cas. 40.

[3] See the cases above cited. And see post, §§ 5, 6.

(b) The capacity to enter into contracts in its corporate name like an individual.

(c) The capacity to take, hold, and convey property in its corporate name like an individual.

(d) The capacity to commit torts and crimes, with some exceptions, like an individual.

(e) The capacity to sue and be sued in its corporate name like an individual.

(2) It is merely by a fiction of the law that a corporation is thus a legal entity distinct from its members. In reality, it is a collection or association of natural persons, who are created into a body for the purposes above enumerated, and it will be treated as such, both in equity and at law, whenever the fiction is urged to an intent and purpose which is not within its reason and policy.[4]

§ 2. Objects and advantages of incorporation.

One of the objects and advantages of incorporation at the present time is the obtaining of capital. Another advantage is that a man may in this way invest a certain amount of his property in a business without risking more, for, as we shall presently see, members of a corporation are not personally liable for its debts, unless made so by statute, beyond their respective shares of the capital invested in the enterprise. The chief advantage, however, is that by this method a large number of individuals may act as a body, just as a single individual may act, and as a corporation has the capacity of succession, there is no danger of the business being interrupted, or the object of the association defeated, by the death or withdrawal of individual members. If a number of natural persons associate for the purpose of accomplishing any object, without being incorporated, the law regards them merely as individuals. When they enter into a contract, it is not the contract of the association as a distinct legal entity, but it is the joint or joint and several contract of the individuals as individuals. At common law, if the contract is

[4] State v. Standard Oil Co., 49 Ohio St. 137, 34 Am. St. Rep. 541; People v. North River Sugar Refining Co., 121 N. Y. 582, 18 Am. Rep. 843, 1 Cum. Cas. 570, 2 Smith's Cas. 943; post, § 7.

joint, all of the individuals, however numerous, must sue or be sued upon it. An action cannot be brought by or against the association unless it is permitted by statute. If the business requires the taking, holding, and conveyance of property, the property must be conveyed to and by the members of the association as individuals. The title to the property is not in the association, but in the individuals as tenants in common. If a member of the association dies, his undivided interest in the property does not remain in the association for the purpose of carrying out its objects, but descends to his heirs, or goes to his personal representatives. It is chiefly to obviate difficulties and objections like these, among others, that corporations are created.

Blackstone very clearly points out the objects and advantages of incorporation in his day as follows: "These artificial persons," he said, "are called bodies politic, bodies corporate, (*corpora corporata*), or corporations; of which there is a great variety subsisting for the advancement of religion, of learning, and of commerce; in order to preserve entire and forever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To show the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum,* for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so; but they could neither frame, nor receive any laws or rules of their conduct; none, at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities; for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability to defend them?

And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally as unconnected as themselves? So also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws for this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws: the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be forever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the River Thames is still the same river, though the parts which compose it are changing every instant."[5]

§ 3. Origin and history of corporations.

It has been said that corporations had their origin in Greece, as they were known among the Greeks as early as the time of Solon,—between 638 and 559 B. C. It seems, however, that they were known among the Romans at an earlier day than this. Blackstone says, on the authority of Plutarch, that they were introduced by Numa Pompilius (715 to 672 B. C.), "who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and

[5] 1 Bl. Com. 467, 468.

politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession." "They were afterwards," he continues, "much considered by the civil law, in which they were called *universitates,* as forming one whole out of many individuals; or *collegia,* from being gathered together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline."[6] From the Romans, corporations were introduced into England at an early day.[7] And from England they were introduced into this country under the provincial government, and finally under the independent government of the states and the United States. At first they were created chiefly for purposes of government, as in the case of cities and towns, or for the purpose of administering charitable trusts, as in the case of endowed hospitals and colleges, but later they were created extensively for the purposes of private business. At the present time they are very numerous, and exist for almost every conceivable object, both public and private.

§ 4. A corporation as a "franchise."

To be a corporation is a franchise, and therefore, as we shall hereafter see, a corporation cannot be created except by or under special authority from the state.[8] For this reason, a corporation has sometimes been defined as a "franchise." Thus, Chancellor Kent said in his Commentaries: *"A corporation is a franchise* possessed by one or more individuals, who subsist, as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual."[9] This, however, is

[6] 1 Bl. Com. 468, 469; Enc. Brit. "Corporation." See, also, Taylor, Corp. § 1 et seq.

[7] 1 Bl. Com. 468 et seq.; 1 Pollock & Maitland's Hist. Com. Law, 469; Enc. Brit. "Corporation."

For an interesting and instructive article on the history of the law of business corporations before the year 1800, see 2 Harvard Law Rev. 105. And see 11 Fraser's Mag. 309.

[8] Post, § 37.

[9] 2 Kent's Com. 267. See, also, 1 Bl. Com. 123; Gifford v. Livingston, 2 Denio (N. Y.) 395, 1 Smith's Cas. 20, per Hand, Senator.

inaccurate. A corporation is not a franchise, but the consequence of a franchise. *The right to be a corporation* is a franchise, and when this franchise is granted by the state to a body of men, and accepted by them, it creates an invisible, intangible, artificial person, having an individuality, in contemplation of the law, distinct from the men who compose it. This artificial person, the result of the franchise, is a corporation. It is an association or collection of individuals, just as a partnership is,[10] but, unlike a partnership, there is a distinct legal person or entity, in which, for most purposes, the individuality and existence of the members is merged and lost sight of.[11]

§ 5. A corporation viewed as a legal entity distinct from its members.

As stated above, a corporation is purely a creature of the law. Without lawful authority, it cannot exist at all. Men may associate at will for the purpose of an enterprise without being a corporation, but in such a case they are, as to all their acts, and with respect to all rights and liabilities arising out of their dealings in carrying out the enterprise, regarded merely as individuals. For example, as was explained in a previous section, if they enter into contracts, they contract, not as a body, but as individuals; and if they wish to sue, or are to be sued, they must all sue or be sued as individuals, however numerous they may be. These and other difficulties, arising from the fact that in the case of a mere voluntary association of natural persons without incorporation the law recognizes the individuals only, may be obviated by incorporation, and in no other way. It is for this purpose, among others, that corporations are created.

When a number of persons are incorporated, they cease to be a mere collection of individuals, and become a legal body or entity, an invisible and intangible being, which is for many purposes distinct from the individuals of whom it consists. It is for this reason that it is called a corporation,—from the Latin

[10] Post, § 7.

[11] See post, §§ 5, 6, and cases there referred to.

corpus, a body, and *corporatio,* embodiment. In most of the definitions of a corporation this idea is predominant.

Lord Coke said: "Persons capable of purchasing are of two sorts, persons natural, created of God, and persons created by the policy of man, as persons incorporated into a body politic."[12] And in another place he said that it is called a corporation "because the persons composing it are made into one body."[13]

Kyd said, in his treatise on Corporations, that "a corporation * * * is a collection of many individuals, united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence."[14]

Chief Justice Marshall's description of a corporation is to substantially the same effect, though he lays more stress on the existence of the legal entity. "A corporation," he said, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for

[12] 1 Inst. 202, 250.
[13] 10 Co. Rep. 50.
[14] 1 Kyd, Corp. 13.

the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."[15] This language of Chief Justice Marshall has repeatedly been quoted with approval, and there are many other definitions based upon the same idea.[16]

It will thus be seen that a corporation, though composed of individuals, has a distinct and separate existence. It is something more than a collection of individuals. It is in itself an artificial person in the law. When a corporation acts by its duly-authorized agent, the act is the act of this artificial person, and not the act of the individuals of whom it is composed; and when a corporation acquires rights or incurs liabilities, they are the rights and liabilities of the corporation as a legal entity distinct from the individuals of whom it is composed, and not of the individuals as such.[17] "The corporation is the real, though artificial, person substituted for the natural persons who pro-

[15] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 636, 1 Cum. Cas. 490, 496, 2 Smith's Cas. 622, 1 Keener's Cas. 139.

[16] "A corporation is a body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is, for certain purposes, considered as a natural person." Angell & Ames, Corp. § 1.

"A corporation is an artificial person, created by law, having a continuity of existence, either definite or indefinite, and capacity to do authorized acts, and capable, however numerous the persons that compose it may be, of acting as a single individual." Dwight, Persons & Pers. Prop. 350.

"A corporation aggregate is an artificial body of men, composed of divers individuals, the ligaments of which body are the franchises and liberties bestowed upon it, which bind and unite all into one, and in which consists the whole frame and essence of the corporation." Nelson, C. J., in Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 1 Smith's Cas. 4.

See, also, People v. Assessors of Watertown, 1 Hill (N. Y.) 616, 620, 1 Smith's Cas. 18; Gibbs' Estate, 157 Pa. St. 59, 1 Keener's Cas. 3; McKim v. Odom, 3 Bland Ch. (Md.) 407, 418; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 382; Thompson v. Waters, 25 Mich. 214; Board of Com'rs, Tippecanoe Co. v. Lafayette, Muncie & B. R. Co., 50 Ind. 85, 108; Merrick v. Van Santvoord, 34 N. Y. 208; State v. Milwaukee, Lake Shore & W. R. Co., 45 Wis. 579; Allen v. Curtis, 26 Conn. 456.

[17] Reg. v. Arnaud, 16 Law J. Q. B. (N. S.) 50, 1 Cum. Cas. 30, 1 Keener's Cas. 28; Wheelock v.

cured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity."[18]

§ 6. Results of distinction between a corporation and its members.

(a) In general.—It is necessary for the student and the corporation lawyer to keep clearly in mind this conception of a corporation as a legal person distinct from its members, for it is the reason for many important principles in the law governing corporations. Some of the results of this conception of a corporation are shown in the following paragraphs.

(b) Contracts—(1) In general.—If a number of natural persons associate for the purpose of carrying out some enterprise, without being incorporated, and enter into a contract by one or more as the agent of all, the contract is with all jointly, or jointly and severally, as individuals, and not with the association as a distinct body or legal entity. The rights and liabilities arising out of the contract accrue to or against them as individuals, and not as a body.

When persons are incorporated, however, and a contract is entered into by an authorized agent for the corporation, the con-

Moulton, 15 Vt. 519, 1 Cum. Cas. 35; Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131, 1 Smith's Cas. 33, 1 Cum. Cas. 38, 1 Keener's Cas. 33; Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Smith's Cas. 253, 1 Cum. Cas. 792; Tomlinson v. Bricklayers' Union, 87 Ind. 308, 1 Cum. Cas. 33; Williamson v. Smoot, 7 Mart. (La.) 31, 1 Smith's Cas. 24, 1 Cum. Cas. 32; and other cases cited under the section following.

[18] Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131, 1 Smith's Cas. 33, 1 Cum. Cas. 38, 1 Keener's Cas. 33.

tract is the contract of the corporation as a legal entity distinct from the individuals who compose it, and not the contract of the individuals, and if an action is brought on the contract, it must be brought by or against the corporation, just as if it were a single natural person, and cannot be brought by or against the members as individuals.[19]

A corporation is bound by a contract only when it is made by its duly-authorized agents. A contract by a member or members of a corporation, as such, either before or after incorporation, and not as the authorized agents of the corporation, is not the contract of the corporation, and is not binding upon it, unless adopted.[20]

——(2) Contracts between a corporation and its members.—Since a corporation is a legal entity distinct from its members, the rule that a person cannot contract with himself[21] does not apply to contracts between a corporation and its members. Such contracts are perfectly valid.[22]

(c) Taking, holding, and conveying property—(1) Ownership of property.—When a number of persons associate without incorporation, and purchase and take a conveyance of property, they take and hold the same as tenants in common, and the title vests in them as individuals only. If one of them dies, his share descends to his heirs or goes to his personal representative. If they dispose of it, they must convey it as individuals. Any one of them may at any time sell and convey his share, or, subject to certain conditions, have the property partitioned.

It is very different when a corporation acquires property. It is conveyed to it in its corporate name, and the title vests in it

[19] Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Smith's Cas. 253, 1 Cum. Cas. 792.

[20] Davis v. Ravenna Creamery Co., 48 Neb. 471; Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206, 13 Am. St. Rep. 23, 1 Smith's Cas. 44; Sellers v. Greer, 172 Ill. 549; post, § 101. And see Tippets v. Walker, 4 Mass. 595.

[21] Faulkner v. Lowe, 2 Exch. 595; Eastman v. Wright, 6 Pick. (Mass.) 316.

[22] Pope v. Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 439, 66 Am. Dec. 165; Sawyer v. Methodist Episcopal Soc., 18 Vt. 405; Rogers v. Danby Universalist Soc., 19 Vt. 187. See, also, Foster v. Commissioners of Inland Revenue [1894] 1 Q. B. Div. 516, 1 Smith's Cas. 40, 1 Keener's Cas. 41.

as a legal entity distinct from its members. In other words, the property of a corporation, real or personal, is owned by the corporation, and not by its members.

In an English case, in which this principle was applied, the custom-house officers refused to register a vessel belonging to a British corporation, on the ground that some members of the corporation were foreigners, and the statute allowed the registry of such vessels only as belonged wholly to British subjects. On *mandamus* proceedings to compel the officers to register the vessel, it was held that, as it belonged to a British corporation, and not to the members thereof, it was entitled to registry. "The individual members of the corporation, no doubt," said Lord Denman, "are interested in one sense in the property of the corporation, as they may derive individual benefit from its increase, or loss from its destruction; but in no legal sense are the individual members the owners."[23]

On the same principle, the shares in a corporation which owns land are not an interest in land, nor real property, but are mere personal property, and may therefore be sold by verbal contract, notwithstanding the statute of frauds.[24] For the same reason, on the death of the owner, they are distributed as personal property.[25]

[23] Reg. v. Arnaud, 16 Law J. Q. B. (N. S.) 50, 1 Cum. Cas. 30, 1 Keener's Cas. 28.

On the same principle, the fact that members of a domestic corporation are aliens, and that aliens cannot hold land, will not prevent the corporation from acquiring and holding land. Princeton Min. Co. v. Butte First Nat. Bank, 7 Mont. 530.

[24] Bradley v. Holdsworth, 3 Mees. & W. 422.

[25] Russell v. Temple (Mass.) 3 Dane's Abr. 108, 1 Smith's Cas. 23.

For other cases in which the courts have recognized the principle that the property of a corporation belongs to the corporation and not to its members or stockholders, see Parker v. Bethel Hotel Co., 96 Tenn. 252, 1 Smith's Cas. 25; Allen v. Curtis, 26 Conn. 456; Talbot v. Scripps, 31 Mich. 268; Rough v. Breitung, 117 Mich. 48; Tippets v. Walker, 4 Mass. 595; Russell v. McLellan, 14 Pick. (Mass.) 63; Waltham Bank v. Inhabitants of Waltham, 10 Metc. (Mass.) 334; Wilde v. Jenkins, 4 Paige (N. Y.) 481; Mickles v. Rochester City Bank, 11 Paige (N. Y.) 118; Bennett v. American Art Union, 5 Sandf. (N. Y.) 614; City of Utica v. Churchill, 33 N. Y. 161; Baldwin v. Canfield, 26 Minn. 43; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 382; Winona & St. P. R. Co. v. St. Paul & S. C. R. Co., 23 Minn. 359. And see the cases more specifically cited in the notes following.

Compare First Nat. Bank v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904.

——(2) **Conveyances.**—Since the property of a corporation belongs to the corporation, as distinguished from its members, it must be conveyed by the corporation in the corporate name, and not by the members individually or collectively. When the title to land is in a corporation, a conveyance by the members of the corporation in their own names will not be effectual, even though all may join in it.[26]

——(3) **Mortgages.**—It follows that a mortgage by a corporation must be executed in the corporate name, and not by the members individually. If it is executed by the members of the corporation in their own names merely, although all the members may join, and although they may intend to bind the corporation, it is not a valid legal mortgage.[27] It may, however, be good as an equitable mortgage, so as to be enforceable in a court of equity, and recognition of it in a subsequent mortgage by the corporation may give it priority over subsequent legal mortgages executed by the corporation.[28]

——(4) **Rights of action in relation to property.**—On the same principle, members of a corporation cannot in their own names maintain an action of replevin or ejectment to recover possession of property belonging to the corporation, or trover or case to recover damages for its conversion or injury; but the right of action is in the corporation, and must be brought in the corporate name.[29]

——(5) **Execution and attachment.**—Nor can the property of a corporation be attached or taken in execution by the creditors of a member of the corporation.[30]

[26] Wheelock v. Moulton, 15 Vt. 519, 1 Cum. Cas. 35; Parker v. Bethel Hotel Co., 96 Tenn. 252, 1 Smith's Cas. 25. See, also, Baldwin v. Canfield, 26 Minn. 43; Humphreys v. McKissock, 140 U. S. 304; Rough v. Breitung, 117 Mich. 48; Sellers v. Greer, 172 Ill. 549.

[27] Bundy v. Ophir Iron Co., 38 Ohio St. 300, 1 Smith's Cas. 31.

[28] Bundy v. Ophir Iron Co., 38 Ohio St. 300, 1 Smith's Cas. 31; Swift v. Smith, 65 Md. 428, 57 Am. Rep. 336; First Nat. Bank v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904. See post, § 7(g).

[29] Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131, 1 Smith's Cas. 33, 1 Cum. Cas. 38, 1 Keener's Cas. 33; Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Smith's Cas. 253, 1 Cum. Cas. 792; Tomlinson v. Bricklayers' Union, 87 Ind. 308, 1 Cum. Cas. 33; McAfee v. Zettler, 103 Ga. 579; Bethune v. Wells, 94 Ga. 486. And see Bartlett v. Brickett, 14 Allen (Mass.) 62; Bennett v. American Art Union, 5 Sandf. (N. Y.) 614.

[30] Williamson v. Smoot, 7 Mart. (La.) 31, 1 Smith's Cas. 24, 1 Cum. Cas. 32.

(6) Conveyances between a corporation and its members.—A person cannot convey property to himself. He cannot be both grantor and grantee.[31] But, since a corporation and its members are distinct persons in the law, this rule does not prevent a conveyance of property by members of a corporation to the corporation, or *vice versa*.[32] A number of persons may convey to a corporation, even though they alone constitute the corporation. This is frequently done when a partnership is organized into a corporation, and the partnership property is transferred by the partners to the corporation.[33]

(d) Torts and crimes.—Since a corporation is a legal entity distinct and apart from the members who compose it, a corporation may commit torts and crimes. If it does so, an action or indictment may be maintained against the corporation itself as an artificial person, instead of against the members or the officers. The members are not liable individually unless they participate in the tort or crime. On the other hand, a tort may be committed against a corporation, and in such a case the right of action therefor is in the corporation, and not in the members individually.[34]

(e) Actions—(1) In general.—If a number of persons associate without becoming a corporation, and acquire rights or incur liabilities, the rights and liabilities are theirs individually, and they must sue and be sued as individuals, unless it is otherwise provided by some statute. If a thousand persons should enter into a joint contract as an association, an action on the contract at common law would have to be brought by or against each and every one of them.

It is otherwise, however, if they are incorporated, and the con-

[31] Cameron v. Steves, 9 New Bruns. Rep. 141.

[32] Foster v. Commissioners of Inland Revenue [1894] 1 Q. B. Div. 516, 1 Smith's Cas. 40, 1 Keener's Cas. 41; Pope v. Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75.

[33] Foster v. Commissioners of Inland Revenue [1894] 1 Q. B. Div. 516, 1 Smith's Cas. 40, 1 Keener's Cas. 41.

[34] Tomlinson v. Bricklayers' Union, 87 Ind. 308, 1 Cum. Cas. 33; Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Smith's Cas. 253, 1 Cum. Cas. 792; Talbot v. Scripps, 31 Mich. 268; Allen v. Curtis, 26 Conn. 456; McAfee v. Zettler, 103 Ga. 579; Bethune v. Wells, 94 Ga. 486. See post, § 537. Since the stockholders of a cor-

tract is made by the corporation. In such a case, the corporation may sue and be sued as a legal body by the corporate name; and the suit must be by or against the corporation, and not by or against the members. Rights of action accruing to a corporation belong to the corporation, and an action, whether in contract or in tort, and generally whether at law or in equity, cannot be maintained by the members as individuals.[35]

When an action is brought against the stockholders or members of a corporation individually, the corporation is not in any sense a party, and cannot be affected by any judgment therein.*

(2) Members not parties.—When a corporation sues or is sued in its corporate name, the action is by or against the corporation itself as a legal entity, and its members are not in any legal sense parties to the action. It has been held, therefore, that a stockholder or member of a corporation plaintiff or defendant, or a relative of a stockholder or member, is not disqualified to act as judge, or to serve process, under a statute disqualifying parties to actions and persons related to parties.[36]

poration are not individually liable for the torts of the corporation or of its officers or agents, stockholders in a railroad company are not individually liable for the negligence of the officers, agents or employes of the company operating the road. Therefore, where the rights and powers of a railroad company in relation to a connecting road are those of a stockholder merely in the corporation owning and operating the connecting road, it is not liable for such company's negligence. Atchison, Topeka & S. F. R. Co. v. Cochran, 43 Kan. 225, 19 Am. St. Rep. 129; Pullman Palace Car Co. v. Missouri Pacific R. Co., 115 U. S. 587.

[35] Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131, 1 Cum. Cas. 38, 1 Smith's Cas. 33, 1 Keener's Cas. 33; Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Smith's Cas. 253, 1 Cum. Cas. 792; Tomlinson v. Bricklayers' Union, 87 Ind. 308, 1 Cum. Cas. 38; Bartlett v. Brickett, 14 Allen (Mass.) 62; Bennett v. American Art Union, 5 Sandf. (N. Y.) 614; Talbot v. Scripps, 31 Mich. 268; Allen v. Curtis, 26 Conn. 456; McAfee v. Zettler, 103 Ga. 579; Bethune v. Wells, 94 Ga. 486. See post, § 536 et seq.

*Lillard v. Porter, 2 Head (Tenn.) 177.

Service of process upon the stockholders of a corporation is not service on the corporation, and does not make the corporation a party to the action. Lillard v. Porter, supra; Bache v. Nashville Horticultural Society, 10 Lea (Tenn.) 436.

In an action to which the stockholders only of a corporation have been made parties, an attachment cannot be levied on the assets of the corporation. Lillard v. Porter, supra.

[36] Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315; Merchants' Bank v. Cook, 4 Pick. (Mass.) 405; Stu-

——(3) **Set-off by members.**—In a suit against a corporation by a creditor of the corporation, demands due by the plaintiff to the stockholders as individuals cannot be interposed as equitable set-offs against the plaintiff's demand, even though the plaintiff is insolvent, and even though the stockholders interposing the set-off own all the stock in the corporation.[37] The reason is that, in contemplation of law, the demands are not due from the plaintiff to the corporation, and the plaintiff's demand against the corporation is not a demand against the stockholders. A demand, to be the subject of a set-off, must be due from the plaintiff to the defendant.

——(4) **Judgments.**—A judgment against a corporation does not bind the property of the members, though it is conclusive against the members for certain purposes, as, for example, in an action against them to enforce a personal liability for the debts of the corporation imposed upon them by statute.[38]

——(5) **Actions between a corporation and its members.**—Since a corporation and its members are not the same, the rule that a man cannot sue himself[39] does not apply to actions between a corporation and its members. A member of a corporation, therefore, may sue the corporation, and *vice versa,* both in equity and at law.[40]

——(6) **Residence and citizenship for the purpose of jurisdiction.**—When jurisdiction of an action by or against a corporation depends upon residence or citizenship, it is the residence or citizenship of the corporation, and not that of its members, that controls. As a general rule, for the purposes of jurisdiction, in the state or federal courts, a corporation, as a legal entity, is a resident of the city or county in which it has its principal office or

art v. Mechanics' & Farmers' Bank, 19 Johns. (N. Y.) 496. But see, to the contrary, Washington Ins. Co. v. Price, 1 Hopk. Ch. (N. Y.) 1, 1 Smith's Cas. 55.

[37] Gallagher v. Germania Brewing Co., 53 Minn. 214, 1 Keener's Cas. 36, 1 Smith's Cas. 37.

[38] Hale v. Hardon, 95 Fed. 747; Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 62 Am. St. Rep. 693. See chapter xxv.

[39] Eastman v. Wright, 6 Pick. (Mass.) 316.

[40] Waring v. Catawba Co., 2 Bay (S. C.) 109, 1 Smith's Cas. 39; Sawyer v. Methodist Episcopal Soc., 18 Vt. 405; Rogers v. Danby Universalist Soc., 19 Vt. 187; Culbertson v. Wabash Nav. Co., 4 McLean, 544, Fed. Cas. No. 3,464.

place of business, and a resident or citizen of the state under the laws of which it was created, and it can make no difference where its members reside, or of what state or country they are citizens or subjects.[41]

(f) Agent of a corporation not the agent of its members.—The agent of a corporation is the agent of the corporation as a legal entity only, and is not the agent of the members as individuals, and his acts, therefore, are not binding upon the members except in their corporate capacity. For this reason it has been held that a purchaser of stock from a member of a corporation cannot avoid his purchase because of fraud upon the part of an officer of the corporation, to which the seller was not privy.[42] As we have seen in the preceding paragraphs, members of a corporation are not its agents merely by virtue of their membership.[43]

(g) Notice to members not notice to corporation.—Since a corporation is a legal person distinct from its members, and its members are not its agents merely by reason of their membership, notice to members of a corporation other than its duly-authorized agents is not notice to the corporation.[44]

(h) Declarations and admissions of members as evidence.—The distinction between a corporation and its members is well illustrated by the rule of evidence excluding evidence of declarations or admissions of members of a corporation as evidence against the corporation. The declarations and admissions of a member of a corporation, when he is not acting as its authorized agent, are no more admissible in evidence against the corporation than the declarations or admissions of a stranger in no way connected with the corporation.[45]

§ 7. A corporation viewed as an association of individuals.

(a) **In general.**—While a corporation is a legal entity dis-

[41] Post, § 114 et seq.

[42] Moffat v. Winslow, 7 Paige (N. Y.) 124.

[43] Ante, § 6(b), (c).

[44] Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 40 Am. St. Rep. 299.

[45] Hartford Bank v. Hart, 3 Day (Conn.) 495, 3 Am. Dec. 274; Fairfield County Turnpike Co. v. Thorp, 13 Conn. 173, 1 Smith's Cas. 53; Dean v. Ross, 105 Cal. 227; Polleys v. Ocean Ins. Co., 14 Me. 141. And see New Ebenezer Ass'n v. Gress Lumber Co., 89 Ga. 125.

tinct from its members for the purpose of suing and being sued, and for the purpose of contracting and taking, holding, and conveying property, etc., it is so by a mere fiction of the law only, and merely for the purpose of convenience in the transaction of its business. In reality, a corporation is a collection or association of individuals, and the fiction must be disregarded, and this fact recognized by the courts, whenever the fiction is urged to an intent and purpose which is not within its reason and policy.[46]

Indeed, in the earliest descriptions of a corporation, the idea that it was an association of individuals was predominant, and it is so, also, in some of the later definitions and descriptions. In the Roman law, a corporation was regarded as a collection of individuals, rather than as a distinct person or entity.[47] Mr. Kyd, one of the earliest English writers on the subject, defines a corporation as a "collection of many individuals, united into one body, under a special denomination," etc.,[48] and in this he is followed by other writers,[49] and by judges.[50]

Mr. Morawetz says: "While a corporation may, from one point of view, be considered as an entity without regard to the corporators who compose it, the fact remains self-evident that a corporation is not *in reality* a person or a thing distinct from

[46] State v. Standard Oil Co., 49 Ohio St. 137, 34 Am. St. Rep. 541; People v. North River Sugar Refining Co., 121 N. Y. 582, 18 Am. St. Rep. 843, 1 Cum. Cas. 570, 2 Smith's Cas. 943; Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 1 Keener's Cas. 20; Bank of United States v. Deveaux, 5 Cranch (U. S.) 61, 1 Smith's Cas. 58; Marshall v. Baltimore & Ohio R. Co., 16 How. (U. S.) 327, 1 Smith's Cas. 62; Woodbridge v. Pratt & Whitney Co., 69 Conn. 304; First Nat. Bank of Chicago v. Trebein Co., 59 Ohio St. 316; First Nat. Bank v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904.

[47] See Taylor, Corp. § 1 et seq.

[48] 1 Kyd, Corp. 13.

[49] Taylor, Corp. § 51.

[50] "Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association." Per Mr. Justice Field in Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317, 330.

Mr. Justice Story said: "An aggregate corporation at common law is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character, which do not belong to the natural persons composing it." Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 517.

its constituent parts. The word 'corporation' is but a collective name for the corporators or members who compose an incorporated association; and where it is said that a corporation is itself a person, or being, or creature, this must be understood in a figurative sense only."[51] In another place he says: "The statement that a corporation is an artificial person, or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body: a corporation is really an association of persons, and no judicial *dictum* or legislative enactment can alter this fact."[52]

(b) Rights of members.—Both courts of law and courts of equity must recognize the fact that a corporation is an association of individuals, for the purpose of enforcing the rights of the members as such, both as against the corporation and its officers, and as against the other members. Thus, in courts of law, a member of a corporation may sue the corporation to recover his proportion of dividends declared by the directors,[53] or he may sue out a writ of *mandamus* to compel the officers of the corporation to allow him to inspect the books of the corporation,[54] or to enforce his right to vote at corporate meetings,[55] or to compel reinstatement if he is wrongfully expelled.[56] And in equity a member of a corporation may sue to enjoin the corporation or its officers from engaging in transactions which are an infringement of his rights as a member.[57]

(c) Rights of corporation.—The fact that a corporation is an association of individuals is also recognized in courts of law as well as in courts of equity for the purpose of enforcing rights of the corporation against the members, as for the purpose of enforcing a member's liability on a subscription to the capital stock.[58] In equity, though not at law, a member of a corporation may maintain a suit to enforce rights of the corporation it-

[51] 1 Morawetz, Priv. Corp. § 1.

[52] 1 Morawetz, Priv. Corp. § 227.

[53] Post, § 527.

[54] Post, § 533.

[55] Post, chapter xxiv.

[56] Post, § 373(d).

[57] Post, § 210; Board of Com'rs, Tippecanoe Co., v. Lafayette, Muncie & B. R. Co., 50 Ind. 85.

[58] Post, § 492.

self, if the corporation and its officers fraudulently refuse to enforce them.[59]

(d) Acts of members as acts of corporation.—Ordinarily, as we have seen, the acts of a corporation are the acts of the legal entity, and not the acts of the members individually, and ordinarily the acts of the members, when not acting as the authorized agents of the corporation, are not the acts of the corporation. This, however, is because of the legal fiction that a corporation is a body distinct from its members, and when this fiction is urged for a purpose which is not within its reason, not only courts of equity, but courts of law as well, will look beyond the corporation as a legal entity, and, ignoring the fiction, recognize acts of the members as acts of the corporation.

——**Ohio case.**—In a late Ohio case, *quo warranto* proceedings were brought against the Standard Oil Company to oust it of the right to be a corporation, on the ground that it had abused its corporate franchises by becoming a party to a trust agreement, which was against public policy. The proceedings were resisted on the ground that the agreement was made by the individual stockholders of the corporation in their individual capacity, and was not the agreement of the corporation. The defense was based upon the argument that the corporation was a legal entity, separate from its stockholders; that in it were vested all the property and powers of the company, and that it could only be affected by such acts and agreements as might be done or executed on its behalf by its corporate agencies, acting within the legitimate scope of their powers; that its stockholders were not the corporation; that their shares were their individual property, and that they might each and all dispose of and make such agreements affecting their shares as might best suit their private interests; and that no such acts and agreements of the stockholders, subservient of their private interests, could be ascribed to the company as a separate entity, though done and concurred in by each and all of its stockholders. The court disregarded this fiction, how-

[59] Foss v. Harbottle, 2 Hare, 461, 1 Cum. Cas. 693; Dodge v. Woolsey, 18 How. (U. S.) 331, 1 Cum. Cas. 739; Allen v. Curtis, 26 Conn. 456; post, § 536 et seq.

ever, and held that the acts of the stockholders were in effect the acts of the corporation, and ousted the defendant from the right to perform the agreement. Judge Minshall said: "The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, and in suing and being sued, and to preserve the limited liability of the stockholders, by distinguishing between the corporate debts and property of the company, and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim, *in fictione juris subsistit aequitas,* is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts. * * * 'It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' * * * 'They were invented for the advancement of justice, and will be applied for no other purpose.' And it is in this sense that they have been constantly understood and applied in this state. * * * No reason is perceived why the principles applicable to fictions in general, should not apply to the fiction that a corporation is a personal entity, separate from the natural persons who compose it, and for whose benefit it has been invented. * * * The idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has no foundation in reason or authority, is contrary to the fact, and, to base an argument upon it, where the question is, as to whether a certain act was the act of the corporation, or of its stockholders, cannot be decisive of the question,

and is therefore illogical; for it may as likely lead to a false, as to a true result. Now, so long as a proper use is made of the fiction, that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined, whether the act in question, though done by shareholders, that is to say, by the persons united in one body, was done simply as individuals, and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act."[60]

——**New York case.**—There was a similar decision in New York in a suit to forfeit the charter of the North River Sugar Refining Company because of its entering into an agreement and combination for the purpose of forming a trust. The combination having been effected by a transfer of their stock and a trust agreement on the part of all the stockholders and trustees, it was contended that everything that was done was done by the stockholders and not by the corporation, or, as it was put by Judge Finch, "that while all that was human and could act had sinned, yet the impalpable entity had not acted at all and must go free." This contention, however, was not sustained, and there was a judgment of dissolution.[61]

(e) Fraud and other illegal acts.—A corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the guise of the fiction that a corporation is a legal entity separate and distinct from its members. When this is attempted, the fiction will be disregarded by the courts, and the acts of the real parties dealt with as though no corporation had been formed.[62]

[60] State v. Standard Oil Co., 49 St. Rep. 843, 1 Cum. Cas. 570, 2 Ohio St. 137, 34 Am. St. Rep. 541. Smith's Cas. 943.

[61] People v. North River Sugar Refining Co., 121 N. Y. 582, 18 Am.

[62] First Nat. Bank of Chicago v. Trebein Co., 59 Ohio St. 316. For a late case in which a cor-

This principle applies, for example, when individuals attempt to defraud their creditors by forming a corporation and transferring their property to it. And it also applies in many other cases.[63] Whenever the real purpose for which a corporation is formed is to use it as an instrumentality in the accomplishment of a fraud or any other illegal purpose, the fact of incorporation will not avail the promoters or members in a suit against them to recover money or property obtained by such methods.[64]

(f) Stockholders are "interested" in property of corporation.—Though the title to the property of a corporation is in the corporation, and not in the stockholders, the stockholders are undoubtedly *interested* therein. Though the title is in the corporation, the beneficial interest is in the stockholders in proportion to their shares. It has been held, therefore, that the stockholders of a corporation have an insurable interest in its property.[65]

For the same reason, a stockholder is *interested* in an action by or against the corporation, although not technically a party thereto, and would be within a statute disqualifying, as judge or juror, a person interested in an action.[66] And under a statute imposing a tax upon "persons interested in the use" of a distillery, it has been held that the stockholders of a corporation operating a distillery are liable.[67]

(g) Mortgage by stockholders enforceable in equity.—Since a corporation is in reality a collection of persons, who have the

poration was held a party to and liable for fraud and conspiracy by imputing to it acts of its stockholders, see Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290; post, § 238(c), note.

[63] First Nat. Bank of Chicago v. Trebein Co., 59 Ohio St. 316. See, also, Terhune v. Hackensack Sav. Bank, 45 N. J. Eq. 344; Kellogg v. Douglas County Bank, 58 Kan. 43; Bennett v. Minott, 28 Or. 339; Des Moines Gas Co. v. West, 50 Iowa, 16; Chicago & Grand Trunk R. Co. v. Miller, 91 Mich. 166; Montgomery Web Co. v. Dienelt, 133 Pa. St. 585, 19 Am. St. Rep. 663; Hibernia Ins. Co. v. St. Louis & New Orleans Transp. Co., 13 Fed. 516.

[64] Brundred v. Rice, 49 Ohio St. 640, 34 Am. St. Rep. 589.

[65] Warren v. Davenport Fire Ins. Co., 31 Iowa, 464, 7 Am. Rep. 160, 1 Smith's Cas. 48.

[66] See Washington Ins. Co. v. Price, 1 Hopk. Ch. (N. Y.) 1, 1 Smith's Cas. 55.

[67] United States v. Wolters, 46 Fed. 509.

beneficial interest in its property, a court of equity may give effect to their acts in relation to the property, although they may have been done by them as individuals, and not as the agents of the corporation, nor in its name. As we have seen in another section, a mortgage executed by all the stockholders of a corporation in their own names merely, and as individuals, and covering the property of the corporation, is not a good *legal* mortgage, for in law they do not own the property of the corporation. It is otherwise, however, in equity. A court of equity, in such a case, will look beyond the corporation, regarded as a legal entity distinct from its stockholders, and will recognize *the fact* that the substantial, beneficial ownership of the property is in them, and that the corporation holds it for them, and will enforce the mortgage not only against the stockholders, but also as against the equitable demands of subsequent purchasers or incumbrancers with notice from the corporation.*

II. Essential Attributes of a Corporation.

§ 8. In general.—Though a corporation has various other powers and faculties, the only essential attributes are

(1) The capacity to have continuous existence, by succession of members, under a special name, and in an artificial form.

(2) The capacity to take and grant property, contract obligations, and sue and be sued by its corporate name as an individual.

(3) And the capacity to receive and enjoy in common grants of privileges and immunities.

When a corporation is formed and named, it acquires many powers, rights, capacities, and incapacities. Some of them are necessarily and inseparably incident to every corporation, while others, though generally incident to corporate existence, are not essential.

The powers and faculties ascribed to a corporation by Black-

*Swift v. Smith, 65 Md. 428, 57 168, 72 Am. St. Rep. 904; Bundy Am. Rep. 336; First Nat. Bank of v. Ophir Iron Co., 38 Ohio St. 300, Gadsden v. Winchester, 119 Ala. 1 Smith's Cas. 31.

stone are, in substance, (1) the capacity to have perpetual succession, (2) the power to sue and be sued by its corporate name, (3) to grant or receive by its corporate name, and do all other acts as natural persons may, (4) to purchase and hold lands, (5) to have a common seal, (6) to make by-laws or private statutes for the government of the corporation.[68] All of these powers or capacities are generally incident to corporations,[69] but they are not all essential. The only essential attributes, as was pointed out by Chief Justice Nelson in a New York case, are those stated at the head of this section, namely: (1) The capacity to have perpetual or continuous succession under a special name and in an artificial form; (2) the power to take and grant property, contract obligations, and sue and be sued by its corporate name as an individual; and (3) the capacity to receive and enjoy in common grants of privileges and immunities.[70]

§ 9. Capacity of succession.

One of the principal objects of incorporation is to create an artificial body which shall have the capacity of existing for any length of time notwithstanding the death or withdrawal of the member or members who compose it. This is an essential attribute of a corporation, and is necessary to accomplish the various objects for which corporations are created.[71] Thus, in England the king was held by the common law to be a corporation sole, with the capacity of succession, in order to prevent an *interregnum,* and to preserve the property, rights, and privileges of the crown. In like manner, the parson of a church was held to be a corporation, with the capacity of succession, so that on his death the property of the parish would vest in

[68] 1 Bl. Com. 475.

[69] Post, § 128 et seq.

[70] Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1. And see Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 1 Keener's Cas. 20.

[71] Per Nelson, C. J., in Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 1 Smith's Cas. 4. But see Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 1 Keener's Cas. 20.

his successor, instead of descending to his heirs, or going to his personal representative.[72]

In the case of corporations aggregate, their capacity of succession enables them to engage in enterprises without any danger of their objects being defeated by the death or withdrawal of members. When a member dies or withdraws, the existence and identity of the corporation is not in any way affected. If there is no other way of supplying his place, a new member may be elected, for "all aggregate corporations have a power necessarily implied of electing members in the room of such as go off."[73]

In modern joint-stock corporations, the membership is determined by the ownership of shares of stock. When a stockholder withdraws and transfers his stock, the transferee becomes a member in his place. If a stockholder dies, the person who becomes the owner of the stock succeeds him as a member of the corporation. None of these changes in the slightest degree affect either the existence or the identity of the corporation as a legal body and artificial person. It continues as before, and may continue as the same corporation, through any number of changes, and for any length of time, unless its charter limits the period of its existence. It is, as was said by Blackstone, "a person that never dies; in like manner as the River Thames is still the same river, though the parts which compose it are changing every instant."[74]

§ 10. Capacity to act as an artificial person.

Another attribute which is characteristic of a corporation, and essential to corporate existence, is the capacity to act as a person in the law, distinct and apart from the members who compose it. As has been explained in previous sections, a corporation is regarded as an artificial person, or legal entity distinct from its members, for the purpose of contracting, of taking, holding, and conveying property, of suing and being sued, and for many other purposes.[75] This merging of the individ-

[72] 1 Bl. Com. 470.
[73] 1 Bl. Com. 475.
[74] 1 Bl. Com. 468.
[75] Ante, §§ 5, 6.

ual members of a corporation into one body, so as to create an artificial person, is the most important feature of a corporation, and the feature which, above all others, distinguishes it from associations of individuals who are not incorporated.[76]

§ 11. Corporate name.

It would be obviously impossible for a corporation to contract, or to take and convey property, or to sue or be sued, unless it had a name in which to do so, and therefore a corporate name of some kind is necessary.[77]

It is not necessary, however, that it shall have and use the same name for all purposes. Thus, it has been held that an association is none the less a corporation because it conducts some of its business in an assumed name, and some in the name of the president for the time being.[78]

"A corporation," said Chief Justice Nelson in a New York case, "may have more than one name; it may have one in which to contract, grant, etc., and another in which to sue and be sued; so it may be known by two different names, and may sue

[76] See Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 2, 1 Smith's Cas. 4.

[77] "According to the case of Marriott v. Mascall [Anderson, 206], a corporation is a body politic, consisting of material bodies, which, joined together, must have a name to do things which concern the corporation, or else it is no corporation; and in Rolle's Abridgment, 'Corporation,' 512, citing the Sutton Hospital Case, it is laid down, that the name of incorporation is as a proper name, or a name of baptism. A name, therefore, is essential to a corporation." Per Littledale, J., in Conservators of the River Tone v. Ash, 10 Barn. & C. 349, 1 Cum. Cas. 23. See, also, Bridgeford v. Hall, 18 La. Ann. 211; Smith v. Tallassee Branch of Central Plank-Road Co., 30 Ala. 650; Glass v. Tipton, T. & B. Turnpike Co., 32 Ind. 376.

Blackstone says: "When a corporation is erected, a name must be given to it; and by that name alone it must sue, and be sued, and do all legal acts; though a very minute variation therein is not material. Such name is the very being of its constitution; and, though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions. The name of incorporation, says Sir Edward Coke, is a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather, and by that same name the king baptizes the incorporation." 1 Bl. Com. 474, 475.

[78] Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1, 4; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Cum. Cas. 26, 1 Keener's Cas. 9, 1 Smith's Cas. 1; Edgeworth v. Wood, 58 N. J. Law, 463. And see post, § 50 et seq.

and be sued in either; and the name of the president, his official name, or any other, will answer every purpose. * * * The only material circumstance is, a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation."[79]

§ 12. Common seal.

A corporation has the implied power to use a common seal, but the use of a seal is not at all essential to corporate existence, for "it is now well settled that corporations may contract by resolution, or through agents, without seal."[80]

§ 13. By-laws.

A corporation generally has the implied power to make by-laws for the government of its affairs,[81] but the power is not essential to corporate existence. It "is unnecessary in all cases where the charter sufficiently provides for the government of the body."[82]

§ 14. Power to hold real estate.

Corporations have the power to acquire and hold real estate when necessary or proper in order to accomplish the object for which they were created.[83] This power is implied as an incident to corporate existence, when not expressly granted, but it is not essential to corporate existence.[84] A body may be a corporation, though expressly prohibited by its charter from holding real estate, and no corporation can purchase real estate for a purpose that is foreign to the objects for which it was created.[85]

[79] Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1.

[80] Per Nelson, C. J., in Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 2, 1 Smith's Cas. 4; post, § 192.

[81] Post, § 192.

[82] Per Nelson, C. J., in Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 2, 1 Smith's Cas. 4.

[83] Post, § 132 et seq.

[84] Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 1 Smith's Cas. 4.

[85] Post, § 132 et seq.

§ 15. Transfer of membership.

As an incident to modern business corporations, the shares therein are transferable by the holders without the consent of the other holders, or of the corporation, and when a share is transferred, the transferee becomes a member of the corporation in the place of the transferrer.[86]

This feature, however, is not essential to the existence of a corporation. "For instance, it does not enter into the constitution of our chartered colleges, academies, hospitals, and other corporate institutions founded by public endowment, or private beneficence. It does not enter into the charters of incorporated scientific and literary societies. It does not even form a feature in our corporate societies for mutual benefit or charity, in the funds of which the members have a beneficial interest."[87]

§ 16. Exemption of members from liability for debts.

In the absence of legislation to the contrary, one of the peculiar incidents of incorporation is that the members of the corporation are not individually liable for its debts beyond the actual amount of their respective proportions of the capital. The property of a corporation may be subjected to the payment of its debts, and the members may thus lose what they have put into the corporation, but beyond this, at common law, they are not liable at all for corporate debts. This important incident of a corporation has sometimes been referred to as an essential characteristic, but it is not necessarily so at all. The legislature may make the stockholders or members of a corporation personally liable for its debts, and in most jurisdictions such statutes have been enacted. Such liability on the part of the members does not make the body any the less a corporation. "Amongst us, as in England, bodies politic or corporate may exist where the ultimate personal liability is still retained. The personal liability is indeed suspended in such cases, and for a

[86] Post, § 557 et seq.

[87] Per Verplanck, Senator, in Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 10, 1 Smith's Cas. 9.

time merged in that of the artificial corporate person; but there may be an ulterior recourse to the corporators when the former fails."[88]

III. The Distinction Between Corporations and Other Associations.

§ 17. The distinguishing mark.—The only characteristic which in all cases distinguishes a corporation from unincorporated associations is the merging of the individuals who compose the corporation into a distinct artificial existence. If this feature exists, an association is a corporation, but not otherwise. An association does not become a corporation merely because it is so called. Nor, on the other hand, is it any the less a corporation because it is not so called. Whether it is a corporation depends upon the powers and faculties conferred upon it.

If a statute imposes a tax or other liability, or confers rights, upon "corporations," using that term, it applies only to associations which are corporations in the legal sense. And since there are many unincorporated associations of individuals which bear a close resemblance to corporations, it is often a difficult matter to determine whether a particular association is a corporation or not. As has already been pointed out, there are some powers which, while they are generally incident to corporations, are not essential, and the fact, therefore, that they are not exercised, or do not exist, in a particular case, does not necessarily show that an association is not a corporation. On the other hand, some of the powers and faculties which are incident to corporations may also exist in unincorporated associations,—more particularly, under modern statutes, in unincorporated joint-stock companies. It is important and necessary, therefore, to find some feature which will serve as a distinguishing mark of a corporation, as distinguished from other associations.

As we shall presently see in more closely comparing incorporated and unincorporated associations, the only distinguish-

[88] Per Verplanck, Senator, in 9; People v. Coleman, 133 N. Y. Warner v. Beers, 23 Wend. (N. Y.) 279, 2 Cum. Cas. 2, 1 Keener's Cas. 103, 1 Cum. Cas. 5, 1 Smith's Cas. 20. And see post, chapter xxv.

ing mark that can be relied upon is the merging of the individuals who compose a corporation into one body, so that the corporation has an existence as an artificial person distinct and apart from its members. "The distinguishing feature, far above all others, is the capacity conferred, by which a perpetual succession of different persons shall be regarded in the law as one and the same body and may at all times act in fulfillment of the objects of the association as a single individual. In this way, a legal existence, a body corporate, an artificial being, is constituted; the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man."[89]

"The most peculiar, and the strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial individual existence."[90]

§ 18. A corporation is known by the powers and faculties conferred.

Whether or not a particular association is a corporation is determined, not by the name or description that may be given to it by the legislature or the associates, but by the powers and faculties which the legislature has conferred upon it. If it is clothed with all the essential attributes of a corporation, it is a corporation.

On the question whether certain banking associations in New York were corporations, Chief Justice Nelson said: "In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the associations; for if they exist in common, or substantially correspond, the answer will be in the affirmative. A corporate body is known to the law

[89] Nelson, C. J., in Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 1 Smith's Cas. 4.

[90] Verplanck, Senator, in Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9. And see Fargo v. Louisville, New Albany & C. R. Co., 6 Fed. 787.

by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term 'corporation' in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms."[91]

On the other hand, if all the essential powers and faculties of a corporation are in fact conferred upon an association, the courts must hold that it is a corporation, and subject to the rules relating to such a body, notwithstanding an express legislative declaration that it shall not be deemed to be included in the definition of a corporation, for such a declaration cannot change its character.[92]

§ 19. Associations existing under foreign laws.

Where a question arises in one state or country as to whether an association of persons under the laws of another state or country is a corporation or merely an unincorporated association, the question depends upon the nature of the association, and the powers and faculties conferred upon it. If these are such as to make it a corporation, it will be held to be a corporation, even though the foreign statutes under which it was created or authorized may expressly declare that it shall not be deemed a corporation. "Whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue."[93]

[91] Per Nelson, C. J., in Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 1 Smith's Cas. 4. And see Edgeworth v. Wood, 58 N. J. Law, 463.

[92] Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, per Cowen, J.; Sandford v. Board of Sup'rs of New York, 15 How. Pr. (N. Y.) 172; People v. Assessors of Watertown, 1 Hill (N. Y.) 616, 620, 1 Smith's Cas. 18; Gifford v. Livingston, 2 Denio (N. Y.) 395, 1 Smith's Cas. 20; Fargo v. Louisville, New Albany & C. Ry. Co., 6 Fed. 787; Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 1 Keener's Cas. 20.

[93] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Smith's Cas. 1, 1 Cum. Cas. 26, 1 Keener's Cas. 9, affirming Oliver v. Liverpool & London L. & F. Ins. Co., 100 Mass. 531.

§ 20. Corporations and partnerships.

At common law there were many points of difference between a corporation and an ordinary partnership, but some of these differences may be done away with by statute, or by agreement between the parties. As a general rule, all voluntary associations which are not incorporated are partnerships. They are not always ordinary partnerships, but they fall within the general definition of a partnership, and are governed by the rules relating to partnership, except in so far as provision to the contrary may be made by statute, or by the articles of agreement or association.[94]

Formation.—In the first place, an ordinary partnership is formed by mere contract between the members who compose it, without any special authority from the state. A corporation, on the other hand, while agreement on the part of the corporators or members is necessary, except in the case of public corporations, cannot be created by such agreement alone, but requires special authority from the state.[95] Unincorporated associations may also be authorized by the state, and therefore the fact that an association is formed under legislative authority does not necessarily make it a corporation.[96]

Continuity of existence.—An ordinary common-law partnership is dissolved by the death or withdrawal of a member. This is so even when a member transfers his interest in the firm with the consent of his partners, and the person to whom he sells is taken into the firm in his place. The existence and the identity

[94] See Hoadley v. Essex County Com'rs, 105 Mass. 519, 1 Keener's Cas. 1; Heath v. Goslin, 80 Mo. 310; Frost v. Walker, 60 Me. 468; Butterfield v. Beardsley, 28 Mich. 412; Whitman v. Porter, 107 Mass. 522; and other cases cited in the notes following under this section.

[95] Post, § 37. "Both partnerships and private corporations are conventional so far as the members are concerned. The difference consists in this, the former is authorized by the general law among natural persons, exercising their ordinary powers; the latter by a special authority, usually, if not necessarily, emanating from the legislature, and conferring extraordinary privileges." Per Cowen, J., in Thomas v. Dakin, 22 Wend. (N. Y.) 9, 109.

[96] See Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9; People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14

of the firm is affected. The old partnership is dissolved, and a new partnership is formed.

In the case of a corporation, by reason of the capacity of succession, it is very different. If a member dies or withdraws, neither the existence nor the identity of the corporation is in the least affected. There is some way, either by election by the remaining members, by transfer of shares, or otherwise, by which a new member comes into the corporation, and, notwithstanding the death or change of members, the corporation not only continues to exist, but it remains the same identical corporation.

This feature of a corporation, however, cannot always be relied upon as a distinguishing mark, for it may be adopted as an article of partnership. In forming a partnership, the members may stipulate in their agreement that persons to whom they may transfer their shares shall come into the firm, and that, on the death of a member, the partnership shall not be dissolved, but his heir or personal representative shall become a member in his stead.[97]

Common name.—A common name has sometimes been mentioned as a criterion of corporate existence, but it is not so necessarily. A partnership may use an assumed name, and it may contract by such name, either with or without legislative authority, without becoming a corporation in any sense.[98] In such a case, however, unless there is some statutory provision to the contrary, the name is merely descriptive of the partners as individuals; the contract is theirs as individuals; and an action thereon must be brought by or against them as individuals. In other words, the use of a common name does not, as in the case of a corporation, give them an artificial existence as a body distinct from their character as natural persons.

[97] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Smith's Cas. 9, 1 Cum. Cas. 5, 12; Hoadley v. Essex County Com'rs, 105 Mass. 519, 1 Keener's Cas. 1; Kingman v. Spurr, 7 Pick. (Mass.) 235; Tenney v. New England Protective Union, 37 Vt. 64; Wrexham v. Hudleston, 1 Swanst. 514. Mining partnerships, as we shall see, are not within the rule governing ordinary partnerships. See infra, this section.

[98] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Smith's Cas. 9, 1 Cum. Cas. 5, 13; Rex v. Webb, 14 East, 406.

Powers.—A partnership, in the absence of statutory restrictions, may engage in any business in which a single individual may engage, and may enter into contracts, and take, hold, and convey property, real or personal, to the same extent as any individual, for it is merely an association of individuals.

A corporation, however, is created by law, and has such powers only as are conferred upon it, expressly or impliedly, by its charter. It cannot lawfully engage in any business except that authorized by its charter, and it cannot lawfully enter into a contract or purchase and hold property for a purpose that is foreign to the objects for which it was created.[99]

Contracts.—When a partnership enters into a contract, the contract binds the partners jointly as individuals, and the rights arising under it belong to them jointly as individuals.

But when a corporation enters into a contract, it is the contract of the corporation as an artificial person. The rights and liabilities arising under it are, as has heretofore been explained, the rights and liabilities of the corporation as a legal person distinct from its members, and not in any legal sense the rights and liabilities of the members as individuals.[100]

Purchasing, holding, and conveying property.—When partners purchase and take a conveyance of property, the title vests in them individually as tenants in common, and if one of them dies, his share in the property descends to his heirs, or goes to his executor or administrator. Conveyances of partnership property may and must be made by the partners as individuals, or by some person under a power of attorney from them.[101]

When property is purchased or otherwise acquired by a corporation, however, the title, as we have seen, vests in the corporation as an artificial person, and not in the members, and its title is in no way affected by the death or withdrawal of members. And conveyances are made by the corporation, and cannot be made by the members acting as individuals.[102]

Use of seal.—If partners execute a contract or conveyance un-

[99] Post, § 123 et seq.

[100] Ante, § 6(b).

[101] See Batty v. Adams County Com'rs, 16 Neb. 44.

[102] Ante, § 6(c).

der seal, each uses his own seal, for the contract or conveyance is executed by them as individuals. When a corporation executes a contract or conveyance under seal, it uses its common or corporate seal.[103]

Actions.—At common law, when an action is brought by or against a partnership, it is brought by or against all the members individually, and cannot be brought by or against the partnership as a body in a common name.[104] Actions by or against a corporation, on the other hand, must be brought by or against the corporation by its corporate name. It cannot be brought by or against the members of the corporation individually.[105]

This incident, however, cannot always be relied upon as distinguishing corporations from unincorporated associations, for the legislature may authorize actions by or against unincorporated associations or partnerships to be brought by or against them in the name of one of their members or officers, or even in a name assumed by them, and this will not necessarily make such associations corporations.[106]

Agency of members.—In a partnership, each partner is the agent of the others in matters within the scope of the partnership business, and to this extent each may bind the others by contracts. In a corporation, the members are not, merely as such, agents of the corporation, and they cannot bind it unless authorized.[107]

Notice to members.—Notice to a partner is notice to the firm,[108] but notice to a member of a corporation is not notice to the corporation, unless he is its duly-authorized agent in the matter to which the notice relates.[109]

Individual liability of members.—In a corporation, in the ab-

[103] Post, § 192.

[104] As we have seen, an association is none the less a corporation because the legislature has authorized suits by or against it in the name of one of its officers. Ante, § 11.

[105] Lewis v. Tilton, 64 Iowa, 220; ante, § 6(e).

[106] Warner v. Beers, 23 Wend. (N.Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9.

[107] Ante, § 6.

[108] Watson v. Wells, 5 Conn. 468; Quinn v. Fuller, 7 Cush. (Mass.) 224; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476.

[109] Mercantile Nat. Bank of Cleveland v. Parsons, 54 Minn. 56, 40 Am. St. Rep. 299; ante, § 6(g).

sence of statutory provision to the contrary, the associates or members are not personally liable for the debts of the corporation beyond their respective proportions of the capital,[110] whereas, in the case of a partnership, all the members are individually liable to the full extent for the partnership debts, unless their liability is limited by statute, or by their articles of association brought to the notice of creditors.[111]

This exemption of members from personal liability has sometimes been mentioned as a mark distinguishing corporations from partnerships,[112] but it is not necessarily so. As we have seen, such exemption from liability is not at all essential to corporate existence, and a corporation may exist where by statute the members are individually liable for its debts.[113] On the other hand, it is well settled that the exemption may exist in the case of a partnership, either by virtue of a statute, or by virtue of stipulations in the partnership agreement brought to the notice of creditors.

It was said in a New York case: "Our own statute of limited partnerships affords sufficient evidence that an alteration of the existing law may be made by statute, so as to exempt from personal liability beyond the stipulated share in the joint funds, for the debts of a firm, without the remotest thought of converting such firms into bodies corporate. Besides, the right of making a contract, whereby those who tender it stipulate not to be bound beyond the amount of some specific pledged fund, must be a natural right growing out of the very nature of contracts. If a company or association, or an individual, offers to contract to make certain payments only to the amount of certain specific funds, and others choose to accept that contract on those conditions, there can be nothing to prevent the validity of such a contract, except some positive rule of law founded on policy or on

[110] Post, chapter xxv; Wechselberg v. Flour City Nat. Bank, 24 U. S. App. 308, 64 Fed. 90.

[111] Tappan v. Bailey, 4 Metc. (Mass.) 529; Skinner v. Dayton, 19 Johns. (N. Y.) 513; Lewis v. Tilton, 64 Iowa, 220; Heath v. Goslin, 80 Mo. 310; Frost v. Walker, 60 Me. 468.

[112] See Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Smith's Cas. 9, per Judge Cowen.

[113] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 13, 1 Smith's Cas. 9; ante, § 16.

arbitrary enactment. In the absence of such a restriction, it is and must be good. Such a limitation, then, must be binding on all who accept the conditions."[114]

Transfer of shares.—In modern business corporations, the shares are transferable by the holder at will, and without the consent of the corporation, or of the other members, and the transferee takes the transferrer's place as a member of the corporation, without affecting the identity of the corporation;[115] whereas, in the case of a partnership, a member cannot transfer his share so as to bring the transferee into the firm, without the consent of the other members, given either in the partnership agreement, or afterwards.[116] And even when such consent is given, the transfer affects the identity of the firm. It is in effect a dissolution of the old firm and formation of a new one.

The transferability of shares, however, is not a mark which can always be relied upon to distinguish a corporation from a partnership, for, as we have seen, it is not essential to the existence of a corporation,[117] and, on the other hand, a provision may be inserted in partnership articles allowing each partner to sell and transfer his interest, and thus introduce a new partner,[118] or the capital of a partnership may be divided into shares, and the shares made transferable by the holder, without giving the association any corporate existence, or rendering them any the less copartnerships, in the strict legal sense of the term.[119]

Dissolution by mutual consent.—A partnership may be dissolv-

[114] Per Verplanck, Senator, in Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 13, 1 Smith's Cas. 9. And see Minnet v. Whinnery, 3 Brown's Parl. Cas. 323; Alderson v. Clay, 1 Camp. 404, note; Lennig v. Penn Morocco Co., 16 Wkly. Notes Cas. (Pa.) 114; Collyer, Partn. 214.

[115] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Smith's Cas. 9, 1 Cum. Cas. 5, 10.

[116] Kingman v. Spurr, 7 Pick. (Mass.) 235; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Moddewell v. Keever, 8 Watts & S. (Pa.) 63; Bray v. Fromont, 6 Madd. Ch. 5.

Some partnerships of a peculiar nature, as mining partnerships, are not within this rule. See infra, this section.

[117] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Smith's Cas. 9, 1 Cum. Cas. 5, 10; ante, § 15.

[118] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Smith's Cas. 9, 1 Cum. Cas. 5, 10; Hoadley v. Essex County Com'rs, 105 Mass. 519, 1 Keener's Cas. 1.

[119] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Smith's Cas. 9, 1

ed at any time by mutual consent of the members, but the charter of a corporation is a compact between the state and the corporators, and a corporation, therefore, cannot be dissolved by the mere mutual consent of the members and surrender of their charter, without the consent of the state.[120]

Merging of members in artificial person.—Though an ordinary copartnership or firm is constantly treated as a body in the actual transaction of its business,[121] it is not generally, if ever, regarded in that light by the law. There is, in the law, no merger of the members in an artificial existence distinct from their existence as individuals.[122] They are simply an association of individuals, and nothing more. Partnership rights are the joint rights of the partners, however numerous they may be, not as an artificial person in any sense, but as individuals. And partnership liabilities are the liabilities of the partners as individuals. When property is acquired by a partnership, it belongs to the partners individually as tenants in common, and there is no artificial person or legal entity in which the title can vest.

In a corporation, however, it is very different. The existence of the members of a corporation is merged, in contemplation of law, in the corporate existence, and the corporation, for the purpose of contracting obligations, purchasing, holding, and conveying property, suing and being sued, etc., is an artificial person entirely separate and distinct from its members.[123] This characteristic, and this characteristic only, can be relied upon in all cases to distinguish a corporation from a partnership.[124]

Mining partnerships, ditch companies, etc.—There are some partnerships which, because of their peculiar nature, are not

Cum. Cas. 5, 10; Rex v. Webb, 14 East, 406; Pratt v. Hutchinson, 15 East, 515; Nockels v. Crosby, 3 Barn. & C. 814; Townsend v. Goewey, 19 Wend. (N. Y.) 427; post, § 21.

[120] Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, 2 Smith's Cas. 604, 1 Cum. Cas. 478; Wilde v. Jenkins, 4 Paige (N. Y.) 481; post, § 308.

[121] See Bank of Buffalo v. Thompson, 121 N. Y. 280; Jones v. Blun, 145 N. Y. 333.

[122] See Lewis v. Tilton, 64 Iowa, 220; Frost v. Walker, 60 Me. 468; Gibbs' Estate, 157 Pa. St. 59, 1 Keener's Cas. 3; Hoadley v. Essex County Com'rs, 105 Mass. 519, 1 Keener's Cas. 1.

[123] This characteristic has already been fully explained. See ante, §§ 5, 6.

[124] Warner v. Beers, 23 Wend.

within the rule governing ordinary partnerships, but have continuity of existence. This is true of mining partnerships. Such a partnership exists when several owners of a mine join in operating it.[125] And it is well settled that in such a partnership there is no *delectus personae,* and it is not dissolved by the death of a partner or the sale of his interest.[126] These associations are not corporations unless incorporated, but they are partnerships governed by special rules of law not applicable to ordinary partnerships.[127] Unincorporated ditch companies for the purpose of supplying water to their members are within the same rules as to continuity of existence.[128]

§ 21. Corporations and joint-stock companies.

It is often very difficult to distinguish between a corporation and a modern unincorporated joint-stock company, since, under the statutes, they possess many common features. The term "joint-stock company" is sometimes used to denote a joint-stock corporation, but the term is used here, as it is generally used in the law, to denote an unincorporated association only.[129]

A joint-stock company in this sense is an association of individuals for the purpose of profit, having a capital divided into shares which are transferable by the owner.[130] It "denotes a union of persons owning together a capital stock which they have devoted to a common purpose, under an organization analogous

(N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9; ante, §§ 8-16.

[125] Skillman v. Lachman, 23 Cal. 199; Manville v. Parks, 7 Colo. 128; Higgins v. Armstrong, 9 Colo. 38; Lamar's Ex'r v. Hale, 79 Va. 147; Snyder v. Burnham, 77 Mo. 52.

[126] Lamar's Ex'r v. Hale, 79 Va. 147; Skillman v Lachman, 23 Cal. 199; Duryea v. Burt, 28 Cal. 569; Jones v. Clark, 42 Cal. 180; Taylor v. Castle, 42 Cal. 367; Charles v. Eshleman, 5 Colo. 107; Higgins v. Armstrong, 9 Colo. 38; Kahn v. Central Smelting Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 252.

[127] Dougherty v. Creary, 30 Cal. 290; Manville v. Parks, 7 Colo. 128; Higgins v. Armstrong, 9 Colo. 38; Santa Clara Min. Ass'n v. Quicksilver Min. Co., 17 Fed. 657; Kahn v. Central Smelting Co., 102 U. S. 641; Snyder v. Burnham, 77 Mo. 52.

[128] McConnell v. Denver, 35 Cal. 365.

[129] See Attorney General v. Mercantile Marine Ins. Co., 121 Mass. 524.

[130] People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14; Gibbs' Estate, 157 Pa. St. 59, 1 Keener's Cas. 3; Phillips v. Blatchford, 137 Mass. 510; Attorney General v. Mercantile Marine Ins. Co., 121 Mass. 524. And see the other cases cited under this section.

to that of a corporation, or a body upon which some of the privileges or powers of corporations have been conferred by statute, but which is not in a full sense a corporation."[131] They have sometimes been spoken of as *quasi* corporations, because of the fact that they resemble corporations,[132] but it is more accurate to describe them as partnerships, with some of the features and powers of a corporation.[133] They are partnerships in fact and in law, and, except in so far as changes have been made by statute, they are subject to all the rules relating to partnerships at common law.[134]

It is often necessary to determine whether an association is a corporation, or merely an unincorporated joint-stock company. Thus, if a statute should impose a tax upon "corporations," unincorporated joint-stock companies would not be liable therefor.[135] And a constitutional provision requiring corporations to be created under general laws only, or requiring a two-thirds vote of the legislature, would not apply to unincorporated joint-stock companies.[136] And so, for many other purposes, whether or not a particular association is within the definition of a corporation, or is a mere unincorporated joint-stock company, is a very important question. Since there is a very close resemblance be-

[131] 2 Addison, Cont. (Abb. & Wood's Ed.) p. 805, note.

[132] Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147.

[133] People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14, per Finch, J.

[134] Clagett v. Kilbourne, 1 Black (U. S.) 346; Hoadley v. Essex County Com'rs, 105 Mass. 519, 1 Keener's Cas. 1; Phillips v. Blatchford, 137 Mass. 510; Tappan v. Bailey, 4 Metc. (Mass.) 529; Whitman v. Porter, 107 Mass. 522; Hedge's Appeal, 63 Pa. St. 273; Logan v. McNaugher, 88 Pa. St. 103; Tide Water Pipe Co. v. Kitchenman, 108 Pa. St. 630; Kramer v. Arthurs, 7 Pa. St. 165; Eliot v. Himrod, 108 Pa. St. 569; Manning v. Gasharie, 27 Ind. 399; Butterfield v. Beardsley, 28 Mich. 412; McGreary v. Chandler, 58 Me. 537; Frost v. Walker, 60 Me. 468; Pennsylvania Ins. Co. v. Murphy, 5 Minn. 36; Pettis v. Atkins, 60 Ill. 454; Robbins v. Butler, 24 Ill. 387; Bullard v. Kinney, 10 Cal. 60; Wells v. Gates, 18 Barb. (N. Y.) 554; Dennis v. Kennedy, 19 Barb. (N. Y.) 517; Schuylerville Nat. Bank v. Van Derwerker, 74 N. Y. 234; Batty v. Adams County, 16 Neb. 44; Tenney v. New England Protective Union, 37 Vt. 64; Henry v. Jackson, 37 Vt. 431.

[135] People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Cum. Cas. 26, 1 Keener's Cas. 9, 1 Smith's Cas. 1; Oliver v. Liverpool & London L. & F. Ins. Co., 100 Mass. 531.

[136] Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 1 Smith's Cas. 4; Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9.

tween the two, because of the fact that many of the ordinary incidents of a corporation may exist by virtue of a statute in an unincorporated association, the difficulty in distinguishing between them is so great that courts and judges have sometimes differed in opinion as to whether particular associations were the one or the other.[137]

As was shown in a previous section, if the legislature confers upon an association all the essential attributes of a corporation, it thereby makes it a corporate body, and it can make no difference that it does not use the term "corporation," or even that it expressly disclaims any intention to make the association a corporation, for whether or not an association is a corporation depends upon its nature and upon the powers and faculties bestowed upon it by the legislature, and not necessarily upon the particular words used in its creation.[138]

Formation.—Unincorporated joint-stock companies, like an ordinary partnership, and unlike a corporation, do not require special legislative authority, but may be formed by mere contract between the members. Such associations are in fact authorized and regulated by statute in many jurisdictions, but statutory authority is not at all essential. They are perfectly valid at common law.[139]

Continuity of existence.—In an ordinary partnership, the death or withdrawal of a member dissolves the firm, but in a joint-stock company there is no *delectus personae*, and the death or withdrawal of a member does not work a dissolution.[140]

[137] Compare Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 1 Smith's Cas. 4; Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9; People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Cum. Cas. 26, 1 Keener's Cas. 9, 1 Smith's Cas. 1.

[138] Ante, § 18; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1, 1 Smith's Cas. 4; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Cum. Cas. 26, 1 Keener's Cas. 9, 1 Smith's Cas. 1; People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14; People v. Assessors of Watertown, 1 Hill (N. Y.) 616, 620, 1 Smith's Cas. 18; Fargo v. Louisville, New Albany & C. Ry. Co., 6 Fed. 787.

[139] People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14; Phillips v. Blatchford, 137 Mass. 510; Harrison v. Heathorn, 6 Man. & G. 81; In re Aston, 27 Beav. 480.

[140] Gleason v. McKay, 134 Mass. 419; Tenney v. New England Protective Union, 37 Vt. 64; Tyrrell v. Washburn, 6 Allen (Mass.) 466.

Common name.—An unincorporated joint-stock company resembles a corporation in that it assumes and uses a common name, but this does not of itself make it a corporation.[141]

Agency for carrying on business.—In an ordinary partnership, each partner is the agent of the others for all purposes within the scope of the partnership business, with power to bind the others by contracts within the scope of the business. An unincorporated joint-stock company, on the other hand, conducts its business through specially designated officers or agents, and the individual members have no authority to bind it. In this respect it resembles a corporation, but this does not make it a corporation.[142]

Contracts.—When an unincorporated joint-stock association makes a contract through a duly-authorized officer or agent, he acts as the agent of all the members, and not of any artificial body, and they are all liable thereon as individuals;[143] but the officers and agents of a corporation act as the agents of the corporation, and not of the members, and the contracts made by them are the contracts of the corporation as a distinct artificial person, and do not bind the members as individuals.[144]

Taking, holding, and conveying property.—Since an unincorporated joint-stock company has not, like a corporation, an artificial existence or legal entity distinct from its members, it cannot take, hold, and convey property by its assumed name. Property must be taken and conveyed either by all the associates as individuals, or by an officer or agent in trust for them, and the title vests in the persons to whom the property is conveyed as tenants in common, or trustee, as the case may be.[145]

Actions.—In the absence of statutory provision to the contrary, actions by or against an unincorporated joint-stock com-

[141] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9; Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147.

[142] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9.

[143] McGreary v. Chandler, 58 Me. 537; Frost v. Walker, 60 Me. 468; Kingsland v. Braisted, 2 Lans. (N. Y.) 17; Tappan v. Bailey, 4 Metc. (Mass.) 529.

[144] Ante, § 6.

[145] Byam v. Bickford, 140 Mass. 31; Pratt v. California Min. Co., 24 Fed. 869; Batty v. Adams County, 16 Neb. 44.

pany must, as in the case of an ordinary partnership, be brought by or against all the associates jointly as individuals. All are necessary parties. Actions cannot be brought by or against the association in its assumed name, like an action by or against a corporation, unless it is authorized by statute.[146]

Statutes have very generally changed this rule by allowing actions to be brought by or against such an association in the name of a particular officer, or in an assumed name. This, however, does not make such an association a corporation.[147]

Actions by members against association.—Under some statutes, where actions are allowed to be brought by or against the president of joint-stock companies as the representative of the associates, it has been held that the company is so analogous to a corporation that an action may be maintained by a shareholder against the president as the representative of the association.[148] This, however, is a recognition of the association as a legal entity separate and distinct from its members. If the statute providing for the organization of joint-stock companies allows suits to be thus brought against the association by the individual members, it in effect makes the association a corporation.[149]

Transfer of shares.—The fact that the capital of a joint-stock company is divided into shares, and that these shares are transferable by the owners, does not make such an association a corporation.[150]

[146] Van Aernam v. Bleistein, 102 N. Y. 355; Austin v. Searing, 16 N. Y. 112; McGreary v. Chandler, 58 Me. 537; Pipe v. Bateman, 1 Iowa, 369.

In equity, when the members are numerous, one or more may sue for the benefit of all. Birmingham v. Gallagher, 112 Mass. 190.

[147] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9; People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14; Van Aernam v. Bleistein, 102 N. Y. 355; Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147.

[148] Westcott v. Fargo, 61 N. Y. 542; Waterbury v. Merchants' Union Exp. Co., 50 Barb. (N. Y.) 157; Maltz v. American Exp. Co., 1 Flip. 611, Fed. Cas. No. 9,002.

[149] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Cum. Cas. 26, 1 Keener's Cas. 9, 1 Smith's Cas. 9; affirming Oliver v. Liverpool & London L. & F. Ins. Co., 100 Mass. 531.

[150] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9; People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14; Gleason v. McKay, 134 Mass. 419; Whitman v. Porter, 107 Mass. 522; Phillips v. Blatchford, 137 Mass. 510.

There is this difference, however, with respect to the transfer of shares, between a corporation and a joint-stock company: In the case of a corporation, the transferee becomes a member of the corporation, without regard to the consent of the other shareholders. In the case of a joint-stock company, though an associate may transfer his interest in any way that would be effectual at common law, the transferee will not become a partner or associate without the consent of the other members, given either at the time of the transfer or afterwards, or in the articles of association.[151]

Individual liability of members.—In the absence of statutory provision to the contrary, or of a stipulation in the articles of association brought to the notice of creditors, the members of an unincorporated joint-stock company are, like the members of an ordinary common-law partnership, personally liable for all debts contracted for the objects, and within the scope, of the association.[152] But this liability on the part of the members may be limited by statute, or by the articles of association, without making the association a corporation;[153] and on the other hand, as we have seen, a statute may impose personal liability upon the members of a corporation, without making the body any the less a corporation.[154] The distinction between a corporation and an incorporated joint-stock company, with respect to individual liability of the members, may be stated thus: The members of a corporation are not individually liable for the debts of the corporation, unless the legislature retains or imposes such liability; but the members of an unincorporated joint-stock company are individually liable for its debts, unless their liability is expressly limited by legislative enactment, or by a stipulation in the articles of association brought to the notice of creditors.[155]

[151] Alvord v. Smith, 5 Pick. (Mass.) 232; Kingman v. Spurr, 7 Pick. (Mass.) 235. And see Harper v. Raymond, 3 Bosw. (N. Y.) 29.

[152] Pettis v. Atkins, 60 Ill. 454; Wells v. Gates, 18 Barb. (N. Y.) 554; Skinner v. Dayton, 19 Johns. (N. Y.) 513; McGreary v. Chandler, 58 Me. 537; Frost v. Walker, 60 Me. 468; Tappan v. Bailey, 4 Metc. (Mass.) 529; Kingsland v. Braisted, 2 Lans. (N. Y.) 17; Lewis v. Tilton, 64 Iowa, 220.

[153] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9.

[154] Ante, § 16.

[155] This distinction is clearly brought out by Judge Finch in the

Dissolution by mutual consent.—Unincorporated joint-stock companies, like a partnership, and unlike a corporation,[156] may be dissolved at any time by the mutual consent of their members, and without the consent of the state.[157]

Merger of members into an artificial existence.—Since a joint-stock company is not a corporation merely because, like a corporation, it is authorized by or organized under a statute, or because the shares are transferable, or because it may exist continuously notwithstanding the death or withdrawal of members, or because it uses an assumed name, or because the members are exempt from personal liability for its debts, we must look for some other feature which will determine in all cases whether an association is a corporation, and not merely an unincorporated

case of People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14. "It is," he said, "an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common-law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the intervention of an express command, the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are, of course, new statutory liabilities, which never, at common law, rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, * * * but is retained by force of the express command of the statute and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily, these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common-law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities, or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Those debts are their debts for which they must answer."

[156] Ante, § 20.

[157] Mann v. Butler, 2 Barb. Ch.

joint-stock company. And we find this distinguishing mark in the merger of the members in an artificial existence distinct from their existence as natural persons. When the law makes the association an artificial person or legal entity distinct from the members who compose it, so that its contracts and acts are the contracts and acts of the body, as distinguished from the associates as individuals, the association is a corporation, but if there is no such distinct legal entity, it is not a corporation.

The inherent difference between a corporation and a joint-stock company, said Judge Finch in a New York case, "is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force."[158]

Some years ago, an act was passed in New York authorizing associations for the purpose of banking, and the act was attacked on the ground that it was not passed in compliance with the constitutional provision requiring a two-thirds vote of the legislature for every bill creating "any body political or corporate." Under the statute, the associations had their capital divided into shares, and the shares were transferable by the owner. Shareholders were exempted by the statute from personal liability, and they were authorized to contract through their president, and to sue and be sued in his name. They could not, however, hold real estate as a corporation does, or contract concerning it in their own name, though their president could take real estate as a trustee for the benefit of the associates. They were merely *permitted* to sue and be sued in the name of their president, and might, if they saw fit, sue in the names of all the associates as individuals. It was held, after some difference of opinion, that

(N. Y.) 362; Lake v. Munford, 4 Smedes & M. (Miss.) 312.

[158] People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14. And see Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 1 Keener's Cas. 20; Niagara County Sup'rs v. People, 7 Hill (N. Y.) 512; Gifford v. Livingston, 2 Denio (N. Y.) 380, 1 Smith's Cas. 20; Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9; People v. Assessors of Watertown, 1 Hill (N. Y.) 620, 1 Smith's Cas. 18.

the existence and individuality of the members was not merged in an artificial existence, or, in other words, that there was no artificial person or legal entity distinct and apart from the members, and that the associations, therefore, were not corporations.[159]

In a Massachusetts case, which went up to the supreme court of the United States on writ of error, the question was whether an English joint-stock insurance company was a corporation, and as such within a statute imposing a tax. It appeared that the company had a distinctive and artificial name, by which it could make contracts. There was also a statutory provision by which it could sue and be sued in the name of its president as the representative of the whole body, and the whole body would be bound by the judgment rendered in such an action; and there was provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members might be introduced in the place of those who should die or sell out. In addition to these features, the existence of the association as an entity distinct and apart from its shareholders was recognized by a provision enabling it to sue its shareholders, and be sued by them. It was held both by the supreme court of Massachusetts and by the supreme court of the United States that the association was a corporation. It was also held that, in so far as the laws of Massachusetts were concerned, it made no difference that the acts of parliament expressly declared that they should not be held to constitute such an association a corporation.[160]

§ 22. Corporations and societies or clubs.

Societies or clubs may be incorporated, but they are often unincorporated. In the latter case, they are merely voluntary associations of persons for some common purpose, usually social,

[159] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cum. Cas. 5, 1 Smith's Cas. 9; People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14.

[160] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Cum. Cas. 26, 1 Keener's Cas. 9, 1 Smith's Cas. 1; affirming Oliver v. Liverpool & London L. & F. Ins. Co., 100 Mass. 531.

literary, or political. The words "society" and "club" have no very definite meaning in the law. They may be formed for a great variety of purposes, and there is no uniformity in their constitutions and rules.[161] Though unincorporated, they often resemble corporations in many respects, as, for example, in having the capacity of succession. Unlike a corporation, however, the members of an unincorporated society or club do not form a collective whole, and cannot collectively acquire any rights, or incur any obligations. There is no distinct legal entity apart from the members.[162] They are generally managed through trustees, who make all necessary contracts, and purchase and hold the property necessary for the purposes of the association.[163] The rights and liabilities of the members depend upon the contract under which they have associated.[164] As a rule, actions cannot, unless permitted by statute, be brought by or against an unincorporated society or club by its name, but must be brought by or against all the members.[165]

IV. When a Corporation is a "Person," "Resident," "Citizen," etc.

§ 23. In general.—A corporation is a "person," "resident," "inhabitant," or "citizen," within the meaning of such terms in a constitutional or statutory provision, when it is within the reason and purpose of the provision, but not otherwise.

§ 24. A corporation as a "person."

Since a corporation is a legal entity, and has an artificial ex-

[161] See Com. v. Pomphret, 137 Mass. 564, 50 Am. Rep. 340.

[162] White v. Brownell, 3 Abb. Pr. (N. S.; N. Y.) 318; East Haddam Central Baptist Church v. East Haddam Baptist Ecclesiastical Soc., 44 Conn. 259; Lafond v. Deems, 52 How. Pr. (N. Y.) 41; Liggett v. Ladd, 17 Or. 89; Crawford v. Gross, 140 Pa. St. 297; Curd v. Wallace, 7 Dana (Ky.) 190, 32 Am. Dec. 85.

[163] See East Haddam Central Baptist Church v. East Haddam Baptist Ecclesiastical Soc., 44 Conn. 259; Liggett v. Ladd, 17 Or. 89; Crawford v. Gross, 140 Pa. St. 297; Birmingham v. Gallagher, 112 Mass. 190.

[164] See Waite v. Merrill, 4 Me. 102, 16 Am. Dec. 238 (society of Shakers); Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; Mann v. Butler, 2 Barb. Ch. (N. Y.) 362; Leech v. Harris, 2 Brewst. (Pa.) 571; Henry v. Jackson, 37 Vt. 431; Logan v. McNaugher, 88 Pa. St. 103.

[165] See Lloyd v. Loaring, 6 Ves. 773; Schuetzen Bund v. Agitations

istence distinct from that of its members, so that it can act through its duly-authorized agents as if it were an individual, it has been properly described as an "artificial person."[166] While it is invisible and intangible, it is a person in the law, and, as such, it has repeatedly been held to be within a constitutional or statutory provision using the word "person," and not referring to corporations in express terms.

The rule in this respect is that, when a constitutional or statutory provision confers a right or imposes a duty or liability upon any "person" generally, without referring to corporations *eo nomine,* it applies to corporations, as well as to natural persons, if they are within its reason and purpose.[167] But they are not included if they are not within its reason and purpose.[168] In some states there is an express statutory provision that the word "person" in a statute may be extended to bodies politic and corporate,[169] but such a provision is not at all necessary.

Verein, 44 Mich. 313; Lewis v. Tilton, 64 Iowa, 220; Pipe v. Bateman, 1 Iowa, 369; Curd v. Wallace, 7 Dana (Ky.) 190, 32 Am. Dec. 85. And see Niven v. Spickerman, 12 Johns. (N. Y.) 401.

[166] 1 Bl. Com. 123; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Cum. Cas. 490, 1 Smith's Cas. 622, 1 Keener's Cas. 139; ante, § 5.

[167] Union Steamship Company v. Melbourne Harbor Trust Com'rs, 9 App. Cas. 365; People v. Utica Ins. Co., 15 Johns. (N. Y.) 353, 8 Am. Dec. 243; People v. Barker, 140 N. Y. 437; Ricker v. American Loan & Trust Co., 140 Mass. 346; Chapman v. Brewer, 43 Neb. 890, 47 Am. St. Rep. 779; Thornton v. Bank of Washington, 3 Pet. (U. S.) 36, 42; Olcott v. Tioga R. Co., 20 N. Y. 210; Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351; People v. City of Riverside, 66 Cal. 288; Douglass v. Pacific Mail Steamship Co., 4 Cal. 304; Commercial Bank of Manchester v. Nolan, 7 How. (Miss.) 508, 523; Stewart v. Waterloo Turn Verein, 71 Iowa, 226, 60 Am. Rep. 786; Turnbull v. Prentiss Lumber Co., 55 Mich. 393; Planters' & Merchants' Bank of Mobile v. Andrews, 8 Port. (Ala.) 404; Emerson v. Goodwin, 9 Conn. 422; Western Union Tel. Co. v. City of Richmond, 26 Grat. (Va.) 1; Miller v. Com., 27 Grat. (Va.) 110.

In a statute punishing the obtaining of property by false pretenses from "any person," the word "person" includes corporations. Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291.

[168] Pharmaceutical Society v. London & Provincial Supply Ass'n, 5 App. Cas. 857; Ingate v. La Commissione Del Lloyd Austriaco. Prima Sezione. 4 C. B. (N. S.) 704; School Directors v. Carlisle Bank, 8 Watts (Pa.) 289; City of Baltimore v. Root, 8 Md. 95; In re McQueen v. Middletown Mfg. Co., 16 Johns. (N. Y.) 5; Betts v. Menard, 1 Ill. 395; Jeffreys v. Belleville Iron Works Co., 15 La. Ann. 19; Factors' & Traders' Ins. Co. v. New Harbor Protection Co., 37 La. Ann. 233.

[169] North Missouri R. Co. v. Akers, 4 Kan. 453.

Particular statutes.—In accordance with the rule above stated, corporations have been held to be included by the word "persons" in a statute giving any person the right to file a mechanic's or material-man's lien for work done or material furnished,[170] in statutes relating to attachment,[171] to taxation,[172] to mechanics' liens,[173] to usury,[174] to insolvency proceedings,[175] and to the limitation of actions,[176] in a statute requiring a certain notice before bringing an action,[177] in a statute giving a right of appeal from an order of the commissioner of highways laying out a highway,[178] in a statute allowing an action for trespass to be brought in the county where the trespass is committed,[179] in a statute prohibiting any person from carrying on the business of banking,[180] in a statute giving a right of action for death caused by the wrongful act or neglect of another,[181] in a statute allowing an action to be brought against any person usurping or unlawfully holding or exercising any public office or "any franchise,"[182] in a statute allowing a petition to quiet title to

[170] Chapman v. Brewer, 43 Neb. 890, 47 Am. St. Rep. 779.

[171] Knox v. Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33; Bray v. Town of Wallingford, 20 Conn. 416; Planters' & Merchants' Bank of Mobile v. Andrews, 8 Port. (Ala.) 404; Bank of United States v. Merchants' Bank of Baltimore, 1 Rob. (Va.) 573; Libbey v. Hodgdon, 9 N. H. 394.

Contra, In re McQueen v. Middletown Mfg. Co., 16 Johns. (N. Y.) 5.

Contra, also, as to a municipal corporation, City of Baltimore v. Root, 8 Md. 95.

[172] People v. Commissioners of Taxes, 23 N. Y. 242; Louisville & Nashville R. Co. v. Com., 1 Bush (Ky.) 250. And see post, § 285.

Contra, School Directors v. Carlisle Bank, 8 Watts (Pa.) 289; Appeal of Fox, 112 Pa. St. 337, 351.

See, also, post, § 285.

[173] Chapman v. Brewer, 43 Neb. 890, 47 Am. St. Rep. 779; London v. Coleman, 59 Ga. 653.

[174] Thornton v. Bank of Washington, 3 Pet. (U. S.) 36, 42; Commercial Bank of Manchester v. Nolan, 7 How. (Miss.) 508, 523; Grand Gulf Bank v. Archer, 8 Smedes & M. (Miss.) 151, 174.

[175] Barth v. Bachus, 140 N. Y. 230, 37 Am. St. Rep. 545.

[176] People v. Rector, etc., of Trinity Church, 22 N. Y. 44, 57; Olcott v. Tioga R. Co., 20 N. Y. 210; Blossburg & Corning R. Co. v. Tioga R. Co., 5 Blatchf. 387, Fed. Cas. No. 1,563; North Missouri R. Co. v. Akers, 4 Kan. 453. Compare Connecticut Mut. Life Ins. Co. v. Duerson, 28 Grat. (Va.) 630.

[177] Boyd v. Croydon R. Co., 4 Bing. N. C. 669.

[178] People v. May, 27 Barb. (N. Y.) 238.

[179] Bartee v. Houston & Texas Cent. R. Co., 36 Tex. 648.

[180] People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

[181] South Western R. Co. v. Paulk, 24 Ga. 356. See post, § 237(d).

[182] People v. City of Riverside, 66 Cal. 288.

land,[183] and in a state statute offering public lands for sale, and providing that they shall be subject to appropriation "by all persons" who might choose to enter the same.[184]

On the other hand, it has been held that a corporation was not within the English mortmain act,[185] or within a statute imposing a penalty for selling one sort of coal for another, and allowing the penalty to be recovered "by the person or persons" informing and suing for the same,[186] or within a statute imposing a penalty upon any person assuming and using the title of chemist and druggist, or pharmacist, without being a pharmaceutical chemist, and registered as provided by the statute.[187]

Penal statutes are strictly construed, and therefore it has been held that a corporation is not to be regarded as within such a statute unless the intention to include them clearly appears.[188]

For this reason it was held, in a Massachusetts case, that a corporation was not within a statute imposing a penalty on the "owner, agent, or superintendent of any manufacturing establishment," who should employ children under a certain age in laboring for more than a certain number of hours a day.[189]

It was also held, in a Maine case, that a corporation was not within a statute imposing a penalty upon "any person" who should take, carry away, or otherwise convert logs to his own use, without the consent of the owner, or who should cut out, alter, or destroy any mark made thereon, with intent to claim the same.[190] In this case, however, the court was influenced by the fact that there were other provisions in the statute which could not apply to a corporation.

Acts of congress.—Corporations have been held to be includ-

[183] Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich, 153 Mass. 42.

[184] State v. Nashville University, 4 Humph. (Tenn.) 157.

[185] Walker v. Richardson, 2 Mees. & W. 882.

[186] Guardians of Poor of St. Leonard's v. Franklin, 3 C. P. Div. 377.

[187] Pharmaceutical Society v. London & Provincial Supply Ass'n, 5 App. Cas. 857.

[188] Benson v. Monson & Brimfield Mfg. Co., 9 Metc. (Mass.) 562; Androscoggin Water Power Co. v. Bethel Steam Mill Co., 64 Me. 441; Pharmaceutical Society v. London & Provincial Supply Ass'n, 5 App. Cas. 857.

[189] Benson v. Monson & Brimfield Mfg. Co., 9 Metc. (Mass.) 562.

[190] Androscoggin Water Power Co. v. Bethel Steam Mill Co., 64 Me. 441.

ed in an act of congress giving a right of action for the subjecting, under color of any law, etc., of "any person within the jurisdiction of the United States" to the deprivation of any rights, privileges, or immunities secured by the constitution of the United States,[191] and in an act punishing any person who shall destroy a vessel with intent to defraud underwriters.[192]

Federal constitution.—A corporation is a "person," within the meaning of the fourteenth amendment of the federal constitution, prohibiting any state from depriving any person of life, liberty, or property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.[193]

"Living person."—A corporation has been held to be a "living person," within the meaning of a statute allowing a party to an action to be examined in his own behalf, when the opposite party or person in interest is living.[194]

"Private person."—The words "private person" in a statute would certainly be held to include private corporations if the statute should be applicable to them, but it could not include a public or municipal corporation.[195]

§ 25. A corporation as a "resident," "inhabitant," or "occupier."

A corporation may not only be a "person," within the mean-

[191] Act Cong. April 20, 1871; Northwestern Fertilizing Co. v. Hyde Park, 3 Biss. 480, Fed. Cas. No. 10,336.

[192] Act Cong. March 26, 1804; United States v. Amedy, 11 Wheat. (U. S.) 392, 412.

[193] Pembina Consolidated Silver Min. & Milling Co. v. Pennsylvania, 125 U. S. 181; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205; Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394; Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U. S. 26; Covington & Lexington Turnpike Road Co. v. Sandford, 164 U. S. 578; Gulf, Colorado & S. F. R. Co. v. Ellis, 165 U. S. 150, 154; Dugger v. Insurance Co., 95 Tenn. 245, 250; Harbison v. Knoxville Iron Co., 103 Tenn. 421, 76 Am. St. Rep. 682; Railroad Co. v. Harris, 97 Tenn. 684, 705.

[194] La Farge v. Exchange Fire Ins. Co., 22 N. Y. 352; Field v. New York Cent. R. Co., 29 Barb. (N. Y.) 176; Johnson v. McIntosh, 31 Barb. (N. Y.) 267.

In Wallace v. City of New York, 2 Hilt. (N. Y.) 440, it was held that a municipal corporation was within this statute.

[195] Coats v. People, 22 N. Y. 245. In this case, an employe or agent of a municipal corporation, or quasi corporation, was held not to be within a statute punishing embezzlement by any clerk or servant of "any private person."

ing of a statute, but it may be a "resident," or "inhabitant," or "occupier." Thus, in an English case it was held that a college corporation seized of lands in fee for its own profit was the "inhabitant" and "occupier" of such lands, within the meaning of a statute providing for poor rates or assessments.[196] And corporations have repeatedly been held to be residents or inhabitants of a particular place, within the meaning of statutes defining the jurisdiction of courts.[197]

A corporation, however, is not a "resident," within the meaning of that term in a statute, if the purpose or terms of the statute are such as to render it inapplicable to corporations.[198]

§ 26. Corporation as a "subject" or "citizen."

A corporation is not strictly a subject or citizen, but it may, in a sense, be so regarded for some purposes. Thus, it is so, *in effect,* within the meaning of the act of congress prescribing the jurisdiction of the federal courts, and giving such courts jurisdiction when the parties to an action are "citizens" of different states. For the purposes of this act, the members of a corporation are conclusively presumed to be citizens of the state under whose laws the corporation was created, and this is equivalent to saying that for the purpose of federal jurisdiction a corporation is a citizen of the state to which it owes its existence.[199]

A corporation is not a citizen, however, within the meaning of article four of the constitution of the United States, declaring

[196] Rex v. Gardner, 1 Cowp. 79.

[197] Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co., 34 Fed. 818; In re Keasbey & Mattison Co., 160 U. S. 221; Day v. Newark India Rubber Mfg. Co., 1 Blatchf. 628, Fed. Cas. No. 3,685; Miller v. Wheeler & Wilson Mfg. Co., 46 Fed. 882. And see post, § 114 et seq.

[198] Thus, it was held that a corporation was not included in the word "residents" in a statute authorizing the subscription, in the name of a town, to stock of a railroad company, upon the written consent of a majority of the taxpayers appearing on the last assessment roll, representing a majority of the taxable property of the residents of said town. People v. Schoonmaker, 63 Barb. (N. Y.) 44.

[199] Barron v. Burnside, 121 U. S. 186; Bank of United States v. Deveaux, 5 Cranch (U. S.) 61, 1 Smith's Cas. 58; Marshall v. Baltimore & Ohio R. Co., 16 How. (U. S.) 327, 1 Smith's Cas. 62; Baltimore & Ohio R. Co. v. Harris, 12 Wall. (U. S.) 65, 1 Cum. Cas. 46; Shaw v. Quincy Min. Co., 145 U. S. 444, 2 Cum. Cas. 5; post, § 114 et seq.

that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.[200]

In England, a British corporation was held to be a British subject, within the meaning of a statute permitting the registry of vessels when owned wholly by a British subject, and it was held that it made no difference that some of the stockholders (or even all) were foreigners.[201]

[200] Paul v. Virginia, 8 Wall. (U. S.) 168; Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181; Ducat v. City of Chicago, 48 Ill. 172, 95 Am. Dec. 529, 10 Wall. (U. S.) 410; Tatem v. Wright, 23 N. J. Law, 429, 441; post, chapter xxvi.

[201] Reg. v. Arnaud, 16 Law J. Q. B. (N. S.) 50, 1 Cum. Cas. 30, 1 Keener's Cas. 28; ante, § 6(c)(1).

CHAPTER II.

CLASSIFICATION OF CORPORATIONS.

§ 27. In general.
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(n) Building and loan associations.
(o) "Literary" corporations.
(p) "Scientific" corporations.
(q) "Charitable" and "benevolent" corporations.
(r) "Religious" corporations.
(s) Corporations "for work of internal improvement," "public improvements," or "public utility."

§ 27. In general.—Corporations are variously classified, according to the number of members who compose them, the objects for

which they are created, the manner in which their membership is evidenced, or the fullness of their power, as follows:

(1) Sole and aggregate,—the former consisting of one member only, and the latter of more than one.

(2) Ecclesiastical and lay,—the former being created for the furtherance of religion and perpetuation of the rights of the church, and consisting entirely of spiritual persons, while the latter are created for temporal or secular purposes.

(3) Eleemosynary and civil,—the former being created for the administration of charitable trusts, as in the case of endowed hospitals, asylums, colleges, libraries, and the like, while the latter are created for private gain or other civil purposes.

(4) Public and private,—the former being created by the state for the purposes of government, while the latter are created for private purposes.

(5) Stock and nonstock,—the former having their capital stock divided into shares transferable by the holder, while the latter have no such capital stock.

(6) Corporations with full powers and quasi corporations,—the latter being persons or bodies having some, but not all, of the attributes of a corporation.

(7) Domestic and foreign,—a foreign, as distinguished from a domestic, corporation, being a corporation created by or under the laws of some other country or state.

(8) Particular statutes sometimes further classify corporations, according to their object or business, as banking, insurance, trading, mercantile, manufacturing, transportation, moneyed corporations, etc.[1]

§ 28. Aggregate and sole corporations.

A sole corporation is a corporation composed of one member only. It "consists of a single individual, having an artificial or legal personality distinguished from his natural character."[2]

An aggregate corporation is a corporation composed of more than one member. Nearly all corporations are of this kind. The fact that all the shares in a corporation aggregate become vested by transfers in a single individual does not make it a cor-

[1] Post, § 36.

[2] Dwight, Persons & Pers. Prop. 351; 1 Bl. Com. 477; Weston v. Hunt, 2 Mass. 500; Overseers of Poor of Boston v. Sears, 22 Pick. (Mass.) 122; Santillan v. Moses, 1 Cal. 92; Archbishop of San Francisco v. Shipman, 79 Cal. 288; McCloskey v. Doherty, 97 Ky. 300.

poration sole, but it retains its original character, for the several shares are treated as remaining distinct, and may at any time be redistributed by the holder.[3]

Among the Romans, all corporations were aggregate, and corporations sole were unknown. Their maxim was, *tres faciunt collegium,* though they held that, if a corporation originally consisting of three members was reduced to one, it might still exist as a corporation.[4]

In England.—A corporation sole was the creation of English law for the purpose of some of the English institutions. At common law, the king was regarded as a corporation sole, with the capacity of succession, in order to prevent a possible interregnum, and to preserve the possessions of the crown.[5] And so it was with bishops, certain deans, parsons, and vicars.[6]

In the United States, corporations sole are rarely met with, and in some states, perhaps, they are not recognized at all,[7] but

[3] Morawetz, Priv. Corp. § 2; Russell v. McLellan, 14 Pick. (Mass.) 63, 69; Newton Mfg. Co. v. White, 42 Ga. 148, 159; Baldwin v. Canfield, 26 Minn. 43; Louisville Banking Co. v. Eisenman, 94 Ky. 83, 42 Am. St. Rep. 335. See post, § 307.

[4] 1 Bl. Com. 469.

[5] Co. Litt. 43; 1 Bl. Com. 469.

[6] 1 Bl. Com. 469. See Ford v. Harrington, L. R. 5 C. P. 282.

It is said by Blackstone: "At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the title of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and encumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, quantenus parson, shall never die, any more than the king; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor; for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also." 1 Bl. Com. 470.

[7] In a late Kentucky case it was said: "There is no such being in this state as a sole corporation, and certainly none such allowed to be created by the statute," referring to a statute allowing "any number of persons" to associate "together" and form a corporation. Louisville Banking Co. v. Eisenman, 94 Ky. 83, 42 Am. St. Rep. 335. But see McCloskey v. Doherty, 97 Ky. 300.

there are a few reported cases in which they have been recognized. In an early Massachusetts case, the minister of a parish, who was seized of parsonage lands in right of his parish, was held to be a corporation sole, in accordance with the English law, so that he could sue as such to recover possession of the same.[8] In an early California case it was held that the priest of a Catholic mission was in a position, with respect to lands of the mission, analogous to that of a corporation sole in England, and that he could maintain an action in his character of priest to recover possession.[9] And in two late cases, one in California and the other in Kentucky, it was held that a Catholic bishop or archbishop was a sole corporation with respect to lands held by him in such character.[10]

Particular public officers have also been sometimes held to be corporations sole, or *quasi* corporations sole, because of their being clothed with certain powers with respect of their office, and being vested with the capacity of succession. Thus, when a statute directs bonds to be made payable to the governor of a state, or any other public officer, he is *quoad hoc* a corporation sole, and he or his successor may sue on such bond.[11] A town supervisor has been held a *quasi* corporation sole.[12]

As we shall see in another place, corporations can be created by or under legislative authority only, and this is true of corporations sole as well as aggregate. It has been held, therefore, that a person cannot be regarded as a corporation sole except by virtue of an act of the legislature conferring corporate powers. Thus, the mere fact that *a court* directs a bond to be made payable to a particular officer does not make him a corporation sole, so that his successor can sue on the bond. In

[8] Weston v. Hunt, 2 Mass. 500. And see Inhabitants of First Parish in Brunswick v. Dunning, 7 Mass. 445; Terrett v. Taylor, 9 Cranch (U. S.) 43; Town of Pawlet v. Clark, 9 Cranch (U. S.) 292, 322.

[9] Santillan v. Moses, 1 Cal. 92.

[10] Archbishop of San Francisco v. Shipman, 79 Cal. 288; McCloskey v. Doherty, 97 Ky. 300. In Illinois, the Catholic bishop of Chicago was created a corporation sole by statute. See Chiniquy v. Catholic Bishop of Chicago, 41 Ill. 148.

[11] Polk v. Plummer, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; Governor v. Allen, 8 Humph. (Tenn.) 176.

[12] Jansen v. Ostrander, 1 Cow. (N. Y.) 670.

the absence of a statute, he himself individually, or, if he be dead, his personal representative, must sue thereon.[13]

Private business corporations.— There are very few instances of corporations sole created for business purposes, but, in the absence of constitutional restrictions, there is nothing to prevent the legislature from creating such a corporation if it sees fit to do so. In an early Maine case, where the legislature had granted corporate powers to one person, *and his successors and associates,* it was held that this merely *permitted* him to take associates, and that it was not necessary for him to do so before the act could take effect. In other words, the act conferred upon him alone the right to exercise all the corporate powers, and made his acts, when acting upon the subject-matter of the corporation, and within its sphere of action and grant of power, the acts of the corporation.[14] In most states, if not in all, the general laws authorizing the formation of corporations expressly require that there shall be a certain number of corporators, or at least more than one.[15]

Differences.— At common law, corporation aggregates could take in succession both real and personal property, but corporations sole could not take goods and chattels for the benefit of themselves and their successors. The reason given was that such movable property was liable to be lost or embezzled, and this would give rise to a multitude of disputes between the successor and the executor, which the law was careful to avoid.[16]

There are also other distinctions between sole and aggregate corporations growing out of their different modes of constitution and forms of action. As was pointed out by Chief Justice Shaw: "A bishop or parson acting in a corporate capacity and holding property to him and his successor in right of his office, has no need of a corporate name, he requires no peculiar seal, he performs all legal acts under his own seal, in his own name and name of office; his own will alone regulates his acts

[13] Kinney v. Etheridge, 3 Ired. (N. C.) 360. And see McDowell v. Hemphill, 1 Winst. (N. C.) 96.

[14] Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656. See, also, Day v. Stetson, 8 Me. 365.

[15] See post, § 46.

[16] 1 Bl. Com. 477.

and he has no occasion for a secretary, for he need not keep a record of his acts; no need of a treasurer, for he has no personal property except the rents and proceeds of the corporate estate, and these he takes to his own use when received. By-laws are unnecessary, for he regulates his own actions, by his own will and judgment, like any other individual acting in his own right."[17]

§ 29. Ecclesiastical and lay corporations.

Ecclesiastical corporations in England were corporations created for the furtherance of religion, and for perpetuating the rights of the church, and were composed entirely of spiritual persons, as bishops, certain deans, archdeacons, parsons, and vicars, who were incorporations sole; and of deans and chapters, and at one time prior and convent, abbot and monks, and the like, who were corporations aggregate.[18]

In the United States, where there is no established church, there are no "ecclesiastical corporations," in the proper sense of the term. Provision is made in all the states for the formation of religious corporations, but they are regarded as mere civil corporations, and differ from ordinary business corporations in their purpose only.[19]

Lay corporations.— All corporations other than ecclesiastical are called "lay corporations." They are created for a variety of temporal or secular purposes, and are, according to their object, either eleemosynary or civil.[20]

§ 30. Eleemosynary and civil corporations.

Eleemosynary corporations are such as are created, not for private gain or profit, but for charitable purposes,—for the administration of charitable trusts. For this reason they are sometimes called "charitable corporations." Corporations creat-

[17] Overseers of Poor of Boston v. Sears, 22 Pick. (Mass.) 122.

And see Archbishop of San Francisco v. Shipman, 79 Cal. 288.

[18] 1 Bl. Com. 470. See Ford v. Harrington, L. R. 5 C. P. 282.

[19] Calkins v. Cheney, 92 Ill. 463; Robertson v. Bullions, 11 N. Y. 243. See post, § 36(r).

[20] 1 Bl. Com. 470. See Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Cum. Cas. 490.

ed for the purpose of maintaining hospitals and homes for the sick, insane, and poor, or for the purpose of maintaining endowed libraries or colleges, are "eleemosynary" or "charitable," as distinguished from "civil," corporations.[21] Corporations other than ecclesiastical and eleemosynary, whether public or private, are called civil corporations.

"Eleemosynary corporations, or those created for charitable purposes, are such as are constituted for the perpetual distribution of the free alms of the founders of them, to such purposes as they have directed. Of this description are hospitals for the maintenance of the poor, sick, or impotent, and colleges or schools for the promotion of piety and learning. The establishment of an institution for the dissemination of learning, has always been considered a charity. The true test of an institution is its origin and objects. If it is founded on donations, and has for its purpose the accomplishment of a charity, by the distribution of alms, it most unquestionably is eleemosynary."[22] In the case from which this quotation is taken, it was held that a corporation having for its sole object the education and instruction of the deaf and dumb, supporting and instructing indigent persons of that class gratuitously, and receiving a pecuniary compensation from pupils able to make it, deriving its means from the donations of individuals and of the public, and applying its funds exclusively to the general object of the institution, was a charitable or eleemosynary corporation.[23]

A corporation organized, not for the purpose of a public charity, but for the benefit, pecuniary or otherwise, of its mem-

[21] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Cum. Cas. 490; Durant v. Kennett, L. R. 5 C. P. 262; American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112; Trustees, etc., of Bishops' Fund v. Eagle Bank, 7 Conn. 476; State v. Adams, 44 Mo. 570; Hearns v. Waterbury Hospital, 66 Conn. 98; Nelson v. Cushing, 2 Cush. (Mass.) 530; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529. And see People v. Fitch, 16 Misc. Rep. (N. Y.) 464; Board of Education v. Greenebaum, 39 Ill. 609; Board of Education v. Bakewell, 122 Ill. 339.

[22] American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112.

[23] American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112. See, also, Saint Clara Female Academy v. Sullivan, 116 Ill. 375, 56 Am. Rep. 776.

bers, is not in any sense an eleemosynary or charitable corporation, but is a private civil corporation, and subject to the same principles and rules of law as other private civil corporations. It has been so held, for example, in the case of an association whose articles described its business to be "such as was usually transacted by savings institutions," and whose by-laws provided for receiving deposits, and foı paying interest thereon at such rates as to indicate that its purpose was the pecuniary profit of its stockholders.[24]

In a late Massachusetts case, a corporation was created by a statute which limited its membership to officers and agents of fire insurance companies in the city of Boston. Power was given the corporation to maintain a corps of men and suitable apparatus for discovering and preventing fires and saving life and property, and its employes were given the right to enter buildings and assist at fires, and certain rights in the streets, subordinate to those of the fire department. The expenses of the corporation were paid by assessments on all fire insurance agencies or organizations doing business in Boston, each of which was required, subject to a penalty for failure to do so, to make a report of the aggregate amount of premiums received by it. The corporation had no capital stock, and had no income except from the assessments. No distinction was made at fires in protecting insured property and property not insured. It was held that the corporation was not a charitable corporation, but a private civil corporation.[25]

[24] Sheren v. Mendenhall, 23 Minn. 92.

[25] Newcomb v. Boston Protective Department, 151 Mass. 215. Compare, however, Bethlehem Borough v. Perseverance Fire Co., 81 Pa. St. 445; Fire Insurance Patrol v. Boyd, 120 Pa. St. 624, 6 Am. St. Rep. 745.

A cemetery corporation is not a charitable corporation. Donnelly v. Boston Catholic Ass'n, 146 Mass. 163.

Nor is a Young Men's Christian Association a charitable corporation. Chapin v. Holyoke Y. M. C. A., 165 Mass. 280.

For other cases, see People v. Nelson, 46 N. Y. 477, 60 Barb. 159, 3 Lans. 394; State v. McGrath, 95 Mo. 193; In re St. Louis Institute of Christian Science, 27 Mo. App. 633; West's Appeal, 64 Pa. St. 186; People v. Gunn, 96 N. Y. 317. And see post, § 36(q).

§ 31. Public and private corporations.

(a) In general.—The rules of law which apply to public corporations are very different in many respects from the rules which apply to private corporations, and therefore the distinction is very important. For example, the property of a public corporation is not taxable, while that of a private corporation is. A public corporation, being a mere instrument or means of government, can be created or dissolved, or its charter amended, by the law-making power at will, and without the consent of the members who compose it, while a private corporation, as we shall see, cannot be created without the consent of the individuals who compose it, and, when once created, cannot be dissolved or changed without their consent, unless the power to do so is reserved in its creation, or unless it has forfeited its right to corporate existence by abuse or nonuser of its powers.[26] There are also many other differences, which will be explained hereafter.

A public corporation, it has been said, is one that is created for a political purpose, with political power, to be exercised for purposes connected with the public good in the administration of civil government. It is an instrument of the government subject to the control of the legislature, and its members are officers of the government appointed for the discharge of public duties.[27] In other words, a public corporation is a corporation created merely for purposes of government, and a private corporation is one that is created for other purposes than those of government.[28] It was held in a Kentucky case that a corpora-

[26] Post, § 270 et seq.

[27] Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365. And see McKim v. Odom, 3 Bland. Ch. (Md.) 407, 417; Downing v. Indiana State Board of Agriculture, 129 Ind. 443; Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318.

[28] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Cum. Cas. 490; University of Maryland v. Williams, 9 Gill & J. (Md.) 365; State v. Maryland Institute for Promotion of Mechanic Arts, 87 Md. 643; Phillips v. University of Virginia, 97 Va. 472; Maia's Adm'r v. Eastern State Hospital, 97 Va. 507; Bonaparte v. Camden & Amboy R. Co., Baldw. 205, Fed. Cas. No. 1,617; Sayre v. Northwestern Turnpike Road, 10 Leigh (Va.) 454; Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. Law, 200, 37 Am. Dec. 233; City of Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642; Vincennes

tion is not a public corporation (in regard to which the state may legislate at pleasure) unless it be invested with political power; or be created to be employed and partake in the administration of the government; or to control funds belonging to the state; or to conduct business in which the state alone is interested, or unless it be the mere instrument of the state, created for government purposes.[29]

To make a corporation public, as distinguished from private, it must be founded by the government for public purposes, and the whole interests must belong to the government.[30] The fact that some of the stock in a corporation is held by the state does not make it a public corporation.[31] But it seems that it is otherwise where all the stock is owned by the state.[32]

If a corporation is of such a character as to be a private corporation, the fact that the legislature has in its charter declared it to be a public corporation does not make it so.[33]

(b) Particular corporations—Cities, towns, villages, etc.—Among the corporations which are clearly public are incorporated cities, villages, and towns, commonly called "municipal corporations." "They are public corporations created by the legislature for political purposes, with political powers, to be exercised for

University v. Indiana, 14 How. (U. S.) 268; Trustees of Schools v. Tatman, 13 Ill. 27; Tinsman v. Belvidere Delaware R. Co., 26 N. J. Law, 148; Cleveland v. Stewart, 3 Ga. 283; Miners' Bank of Dubuque v. United States, 1 G. Greene (Iowa) 553.

[29] City of Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642, per Marshall, C. J., referring to and following the Dartmouth College Case. See, also, Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318.

[30] "Strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government." Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Cum. Cas. 490. And see Downing v. Indiana State Board of Agriculture, 129 Ind. 443.

[31] Bank of United States v. Planters' Bank, 9 Wheat. (U. S.) 904, 907; Turnpike Co. v. Wallace, 8 Watts (Pa.) 316; Miners' Bank of Dubuque v. United States, 1 G. Greene (Iowa) 553, 562; Bradstown & Louisville R. Co. v. Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

[32] Miners' Bank of Dubuque v. United States, 1 G. Greene (Iowa) 553; Allen v. McKean, 1 Sumn. 297, Fed. Cas. No. 229; State Bank of Illinois v. Brown, 1 Scam. (Ill.) 106. Contra, Bank of South Carolina v. Gibbs, 3 McCord (S. C.) 377; Bank of Alabama v. Gibson's Adm'rs, 6 Ala. 814.

[33] Bonaparte v. Camden & Amboy R. Co., Baldw. 205, Fed. Cas. No. 1,617.

purposes connected with the public good, in the administration of civil government. They are instruments of government subject at all times to the control of the legislature with respect to their duration, powers, rights and property. It is of the essence of such a corporation that the government has the sole right as trustee of the public interest, at its own good will and pleasure, to inspect, regulate, control and direct the corporation, its funds and franchises."[34]

—**A turnpike corporation** is a public corporation where the road is built by the state exclusively, and the corporation is created for the purpose of maintaining and managing it, and is composed of public officers only.[35] It is otherwise, however, if the state merely holds some of the stock in a turnpike corporation.[36]

—**A bank** is not a public corporation merely because the state uses it as a depository for public funds, or because the state owns part of the capital stock.[37] But it seems that it is otherwise if the bank is exclusively owned and controlled by the state.[38]

A state board of agriculture, or agricultural society, composed

[34] City of Hagerstown v. Sehner, 37 Md. 180, 193, per Miller, J. See, also, Town of East Hartford v. Hartford Bridge Co., 10 How. (U. S.) 534.

In Dean v. Davis, 51 Cal. 406, a levee district was held to be a public corporation.

And so of reclamation districts. People v. Williams, 56 Cal. 647. See Reclamation District v. Turner, 104 Cal. 334. Compare, however, Harward v. St. Clair & Monroe Levee & Drainage Co., 51 Ill. 130.

So of a school town or township, School Town of Monticello v. Kendall, 72 Ind. 91, 37 Am. Rep. 139; and of trustees of the poor, Governor v. Gridley, 1 Walk. (Miss.) 328.

A fire engine company, the charter of which made all parties not minors, who should hold freehold titles to buildings within certain limits, members of the company, and gave it the power of levying taxes within such limits, was held to be a quasi municipal corporation. Cole v. Greenwich Fire Engine Co., 12 R. I. 202.

[35] Sayre v. Northwestern Turnpike Road, 10 Leigh (Va.) 454.

[36] Huntingdon Turnpike Co. v. Wallace, 8 Watts (Pa.) 316.

[37] Bank of United States v. Planters' Bank, 9 Wheat. (U. S.) 904, 907; Miners' Bank of Dubuque v. United States, 1 G. Greene (Iowa) 553; Ohio State Bank v. Knoop, 16 How. (U. S.) 369. See Bank of Alabama v. Gibson's Adm'rs, 6 Ala. 814.

[38] Miners' Bank of Dubuque v. United States, 1 G. Greene (Iowa) 553. Contra, Bank of South Carolina v. Gibbs, 3 McCord (S. C.) 377. And see State v. State Bank, 1 S. C. 63.

of private individuals, and incorporated for the purpose of promoting agriculture, holding agricultural fairs, etc., is not a public corporation, though the state has made an appropriation of money for its benefit.[39]

——**Corporation for promotion of mechanic arts.**—In a late Maryland case it was held that an institute incorporated for the promotion of the mechanic arts, holding its property in its own right, and managing its business according to its discretion, within the limitations of its charter, free from control by the state, was a mere private corporation, notwithstanding an act of the legislature renewing its charter granted it an annual appropriation.[40]

——**Storage and elevator company.**—A corporation organized to do a general storage and elevator business, and authorized to issue warehouse receipts, advance money thereon, and to hold and convey real and personal property necessary for its purposes, is not a public corporation.[41]

——**Educational and charitable institutions.**—Hospitals, colleges, universities, academies, and other educational corporations are public if they are exclusively endowed and controlled by the state,[42] but not otherwise. State universities, so called, or other educational institutions, are not public corporations merely because the state has made an appropriation or donation of money or land for their benefit, or because, in doing so, it has imposed conditions for the benefit of the public, or reserved some power of control over the conduct of their affairs.[43]

[39] Downing v. Indiana State Board of Agriculture, 129 Ind. 443; Dunn v. Brown County Agricultural Society, 46 Ohio St. 93, 15 Am. St. Rep. 556. But it is quasi public. See note 45, infra.

[40] State v. Maryland Institute for Promotion of Mechanic Arts, 37 Md. 643.

[41] Girard Point Storage Co. v. Southwark Foundry Co., 105 Pa. St. 248.

[42] Trustees of University of Alabama v. Winston, 5 Stew. & P. (Ala.) 17; Phillips v. Rector, etc., University of Virginia, 97 Va. 472; Maia's Adm'r v. Directors of Eastern State Hospital, 97 Va. 507; Mobile School Com'rs v. Putnam, 44 Ala. 506; State v. Knowles, 16 Fla. 577; Dart v. Houston, 22 Ga. 506; Board of Education of Glynn County v. City of Brunswick, 72 Ga. 353; Trustees of Academy of Richmond County v. City of Augusta, 90 Ga. 634; Head v. Curators of University of Missouri, 47 Mo. 220; Lewis v. Whittle, 77 Va. 415; Trustees of Schools v. Tatman, 13 Ill. 27; Curtis v. Whipple, 24 Wis. 350.

[43] Board of Trustees of Vin-

A corporation founded by private donors for the purposes of general charity, such as a hospital or asylum for the insane, sick, or poor, or a college or university, is in a sense a public institution, but it is not a public corporation. The fact that it was founded and endowed for the benefit of the public does not make it so, for, "strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government."[44]

(c) **Quasi public corporations.**—Some private corporations are organized for a purpose which is of a public nature, or rather for a purpose which renders them particularly beneficial, if not necessary, to the public, and are for this reason called *quasi* public corporations; and, because of their *quasi* public nature, they are sometimes given rights and privileges that are not accorded to other corporations,—as the right of eminent domain, for example. Railroad companies engaged in the common carriage of passengers and goods are *quasi* public corporations in this sense. And the same is true of turnpike, ditch, and canal companies, and of water and gas corporations created for the purpose of supplying cities or villages and their inhabitants with water or light.[45]

cennes University v. Indiana, 14 How. (U. S.) 268; State v. Carr, 111 Ind. 335; Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365; Cleveland v. Stewart, 3 Ga. 283; Board of Trustees of Vincennes University v. Indiana, 14 How. (U. S.) 268; City of Louisville v. President, etc., University of Louisville, 15 B. Mon. (Ky.) 642; Board of Education v. Greenebaum, 39 Ill. 609; Board of Education v. Bakewell, 122 Ill. 339; Allen v. McKean, 1 Sumn. (U. S.) 276, Fed. Cas. No. 229.

[44] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Cum. Cas. 490; Society for Propagation of the Gospel v. Town of New Haven, 8 Wheat. (U. S.) 464. See, also, Inhabitants of Yarmouth v. Inhabitants of North Adams, 44 Mo. 570; Allen v. McKeen, 1 Sumn. 297, Fed. Cas. No. 229.

[45] Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Foster v. Fowler, 60 Pa. St. 27; Board of Com'rs Tippecanoe Co. v. Lafayette, Muncie & B. R. Co., 50 Ind. 85; Railroad Com'rs v. Portland & Oxford Cent. R. Co., 63 Me. 269, 18 Am. Rep. 208; Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 61 Fed. 993; McKim v. Odom, 3 Bland Ch. (Md.) 407, 418; Pueblo & Arkansas Val. R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512; Doane v. Chicago City R. Co., 51 Ill. App. 353; Messenger v. Pennsylvania R. Co., 37 N. J. Law, 531, 18 Am. Rep. 754.

Boom companies, engaged in the business of driving logs for the public generally, are quasi public corporations. West Branch Boom Co. v. Pennsylvania Joint Lumber

——**Not public.**—These corporations, though because of their objects they are called *quasi* public, are created for private gain, and are mere private corporations, just as a banking company or insurance company is a mere private corporation. They are not in any sense an agency or instrument of government.[46] It has repeatedly been held, for example, that such corporations are not public in such a sense as to render their property exempt from taxation.[47]

——**Eminent domain.**—The fact that a corporation is given the

& Land Co., 121 Pa. St. 143, 6 Am. St. Rep. 766; Osborne v. Knife Falls Boom Co., 32 Minn. 412, 50 Am. Rep. 590.

A corporation organized for conducting a race track, etc., is not a quasi public corporation. Corrigan v. Coney Island Jockey Club, 2 Misc. Rep. (N. Y.) 512.

And it was held in Massachusetts that a corporation organized for the purpose of supplying heat by the circulation of hot water through pipes to be laid in the streets of a city, and connected by service pipes with the buildings to be heated, was neither a public nor a quasi public corporation. Evans v. Boston Heating Co., 157 Mass 37.

An agricultural corporation, organized to promote agriculture and kindred arts, having no capital stock, and unable to pay dividends, was held to be a quasi public corporation, and for that reason not within the provision of the Michigan constitution that "no corporation, except for municipal purposes, or for the construction of railroads, plank-roads, and canals," should be created for a longer term than thirty years. Kent County Agricultural Soc. v. Houseman, 81 Mich. 609. See, also, Stewart v. Hardin County Agricultural Soc., 6 Ohio Dec. 751.

[46] Canal companies: Rundle v. Delaware & Raritan Canal Co., 1 Wall. Jr. 275, Fed. Cas. No. 12,139; Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. Law, 200, 37 Am. Dec. 233; Hooker v. New Haven & Northampton Co., 15 Conn. 313, 36 Am. Dec. 477.

Railroad companies: Whiting v. Sheboygan & Fond du Lac R. Co., 25 Wis. 167, 3 Am. Rep. 30; Bonaparte v. Camden & Amboy R. Co., Baldw. 205, Fed. Cas. No. 1,617; Thompson v. Union Pac. Ry. Co., 9 Wall. (U. S.) 579; Pierce v. Com., 104 Pa. St. 150; Tinsman v. Belvidere Delaware R. Co., 26 N. J. Law, 148, 69 Am. Dec. 569; Trustees of Presbyterian Society v. Auburn & Rochester R. Co., 3 Hill (N. Y.) 567. Compare United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 291.

Waterworks companies: People v. Forrest, 97 N. Y. 97. Compare Foster v. Fowler, 60 Pa. St. 27.

Gas companies: Com. v. Lowell Gas Light Co., 12 Allen (Mass.) 75; McCune v. Norwich City Gas Co., 30 Conn. 521; State v. New Orleans Gas Light & Banking Co., 2 Rob. (La.) 529; In re New York Cent. & H. R. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326.

Ditch, drainage and levee companies: Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Harward v. St. Clair & Monroe Levee & Drainage Co., 51 Ill. 130; Hessler v. Drainage Com'rs, 53 Ill. 105; Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318.

Turnpike companies: Huntingdon Turnpike Co. v. Wallace, 8 Watts (Pa.) 316.

[47] See Com. v. Lowell Gas Light Co., 12 Allen (Mass.) 75; Thom-

power of eminent domain does not make it a public, as distinguished from a private, corporation, for the state may delegate this power to a private corporation by reason of the benefit to accrue to the public from the use of the improvements to be constructed by the corporation.[48]

§ 32. The United States and the states and territories as corporations.

In England, for the purposes of succession, and to preserve the possessions of the crown, the king was regarded as a corporation sole at common law.[49] And in this country, the United States is a corporation or body corporate, for it may, as an artificial person, enter into contracts, take, hold, and convey property, and sue, and, if it consents, be sued.[50] The same is true of the different states of the Union,[51] and of the territories.[52] A state, said the New York court, "is a legal being, capable of transacting some kinds of business like a natural person, and such a being is a corporation."[53]

A state was held not to be a corporation, however, within the meaning of an act of congress requiring payment of a duty by "every person, firm, company, or corporation, owning or possessing, or having the care, or management of any railroad, canal, steamboat, ship," etc., "engaged, or employed in the business of transporting passengers, or property for hire," etc.[54]

son v. Union Pac. R. Co., 9 Wall. (U. S.) 579. See post, § 298(a).

[48] Rundle v. Delaware & Raritan Canal Co., 1 Wall. Jr. 275; Fed. Cas. No. 12,139; Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. Law, 200, 37 Am. Dec. 233; Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318; Tinsman v. Belvidere Delaware R. Co., 26 N. J. Law, 148; Brady v. State, 26 Md. 290. And see the other cases above cited.

[49] 1 Bl. Com. 470.

[50] Respublica v. Sweers, 1 Dall. (Pa.) 41; Dixon v. United States, 1 Brock. 177, Fed. Cas. No. 3,934; United States v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747; Dugan v. United States, 3 Wheat. (U. S.) 172; Dickson v. United States, 125 Mass. 311, 28 Am. Rep. 230.

[51] State of Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378. In this case it was held that the state of Indiana was a corporation, and, as such, capable of being the payee of a promissory note. See, also, Dikes v. Miller, 25 Tex. Sup. 281, 78 Am. Dec. 571; Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; People v. City of St. Louis, 10 Ill. 351, 48 Am. Dec. 339.

[52] Territory v. Hilderbrand, 2 Mont. 426.

[53] State of Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

[54] State v. Atkins, 35 Ga. 315; Act Cong. June 30, 1864, as amended by Act March 3, 1865.

§ 33. Stock and nonstock corporations.

A stock corporation, or joint-stock corporation, is a private corporation whose capital stock is divided into shares, while the capital of a nonstock corporation is not so divided. Most of the trading, banking, railroad, and other modern business corporations are stock corporations, while mutual insurance companies, religious corporations, and the like are nonstock corporations.[55]

§ 34. Quasi corporations.

Some bodies are created with full corporate powers, while others are not. The latter are called "*quasi* corporations."[56] Private business corporations, eleemosynary corporations, and incorporated cities and villages are clothed with full corporate powers, and are corporations, in the proper sense.

A county, on the other hand, or a board of county commissioners representing the county, is not clothed with full corporate powers, but it may exercise corporate powers for some purposes, —as for the purpose of holding property and making contracts for county purposes, and for the purpose of suing and being sued. Because of its imperfect powers, it is not a corporation in the proper sense, but, because it has some corporate powers, it is a *quasi* corporation.[57] Thus it has been held that a county

[55] See post, § 367.

In New York the statute declares: "A stock corporation is a corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation. A corporation is not a stock corporation because of having issued certificates called certificates of stock, but which are in fact merely certificates of membership and which is not authorized by law to distribute to its members any dividends or share of profits arising from the operations of the corporation." 1 Rev. St. (Birdseye Ed.) p. 649.

[56] See Inhabitants of Fourth School Dist. in Rumford v. Wood, 13 Mass. 193; School District No. 56 v. St. Joseph Fire & Marine Ins. Co., 103 U. S. 707; Levy Court v. Woodward, 2 Wall. (U. S.) 501; County Com'rs Talbot Co. v. County Com'rs Queen Anne's Co., 50 Md. 245; Lorillard v. Town of Monroe, 11 N. Y. 392; Mower v. Inhabitants of Leicester, 9 Mass. 247, 6 Am. Dec. 63; Adams v. Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88; Hedges v. Madison County, 6 Ill. 567; Jansen v. Ostrander, 1 Cow. (N. Y.) 670; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109.

[57] Lawrence County v. Chattaroi R. Co., 81 Ky. 225; County Com'rs Talbot Co. v. County Com'rs Queen Anne's Co., 50 Md. 245; Inhabitants of Hampshire Co. v. Inhabi-

or the board of county commissioners may maintain an action for money paid by it for the use of another county,[58] or an action for obstructing or injuring a highway or bridge held and controlled by it.[59]

The levy court of a county, charged with the duty of laying out and repairing roads, building bridges, and keeping them in repair, providing poorhouses, etc., and laying and collecting taxes for such purposes and for the payment of other county expenses, is a *quasi* corporation, and, as such, has the capacity to sue and be sued.[60]

Towns.— In some states, towns are by statute made full corporations, like incorporated cities and villages,[61] while in others they are *quasi* corporations, with limited powers only,—as the power to make certain contracts, and to sue and be sued.[62]

The inhabitants of a school district, though they are not bodies politic and corporate with the general powers of corporations, are "*quasi* corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage," and may therefore, as a body, maintain an action on a contract to build a schoolhouse, and to make a lease of land to them.[63] A township for public school purposes, like a school district, is a *quasi* corporation, with the capacity to sue and be sued.[64]

If public officers or public boards are given the power to make contracts in reference to public affairs, and are clothed with

tants of Franklin Co., 16 Mass. 76, 87; Hedges v. Madison County, 6 Ill. 567; Slaughter v. Mobile County, 73 Ala. 134.

[58] Lawrence County v. Chattaroi R. Co., 81 Ky. 225.

[59] Inhabitants of Hampshire Co. v. Inhabitants of Franklin Co., 16 Mass. 76, 87.

[60] Levy Court v. Woodward, 2 Wall. (U. S.) 501.

[61] See Town of East Hartford v. Hartford Bridge Co., 10 How. (U. S.) 534.

[62] Lorillard v. Town of Monroe, 11 N. Y. 392; Damon v. Inhabitants of Granby, 2 Pick. (Mass.) 345; Inhabitants of Springfield v. Connecticut River R. Co., 4 Cush. (Mass.) 63; Town of Troy v. Cheshire R. Co., 23 N. H. 83; Hooksett v. Amoskeag Mfg. Co., 44 N. H. 105; Adams v. Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88; Mower v. Inhabitants of Leicester, 9 Mass. 247, 6 Am. Dec. 63; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; Bush v. Shipman, 5 Ill. 186.

[63] Parker, C. J., in Inhabitants of Fourth School Dist. in Rumford v. Wood, 13 Mass. 193; School District No. 56 v. St. Joseph Fire & Marine Ins. Co., 103 U. S. 707. See, also, Trustees of Schools v. Tatman, 13 Ill. 27; State v. Powers, 38 Ohio St. 54.

[64] Bush v. Shipman, 5 Ill. 186.

the capacity of succession, they are *quasi* corporations, and as such they have, without an express grant of authority, the capacity to "sue and be sued in regard to any matter in which, by law, they have rights to be enforced, or are under obligations which they refuse to fulfill."[65] Thus, trustees or overseers of the poor have been held *quasi* corporations, with the capacity to sue coextensive with their public duties.[66] The same has been held of a county levy court charged with duties in connection with county affairs,—as the laying out and repairing of highways, building bridges and keeping them in repair, providing poorhouses, etc.,[67] a board of county supervisors or commissioners,[68] trustees of schools,[69] town supervisors,[70] etc. The governor of a state is a *quasi* corporate sole, with respect to his office, so that when, under a statute, bonds are made payable to him, he or his successor may sue thereon in his official capacity.[71] In New York it was held that the board of health was not a corporation in any sense.[72]

Joint-stock companies.—As we have seen, associations known as "joint-stock companies," though unincorporated, have many features in common with corporations. For this reason, they have sometimes been called *quasi* corporations.[73]

§ 35. Domestic and foreign corporations.

A corporation created by or under the laws of a particular state or country is called, with respect to that state or country, a "domestic corporation." A foreign corporation is one which

[65] Levy Court v. Woodward, 2 Wall. (U. S.) 501; Rouse v. Moore, 18 Johns. (N. Y.) 407; Justices of Cumberland v. Armstrong, 3 Dev. (N. C.) 284; Trustees of Schools v. Tatman, 13 Ill. 27; Polk v. Plummer, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; Jansen v. Ostrander, 1 Cow. (N. Y.) 670; Governor v. Gridley, 1 Walk. (Miss.) 328. And see Cole v. Greenwich Fire Engine Co., 12 R. I. 202.

[66] Rouse v. Moore, 18 Johns. (N. Y.) 407; Governor v. Gridley, 1 Walk. (Miss.) 328.

[67] Levy Court v. Woodward, 2 Wall. (U. S.) 501.

[68] County Com'rs Talbot Co. v. County Com'rs Queen Anne's Co., 50 Md. 245.

[69] Trustees of Schools v. Tatman, 13 Ill. 27.

[70] Jansen v. Ostrander, 1 Cow. (N. Y.) 670.

[71] Polk v. Plummer, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; Governor v. Allen, 8 Humph. (Tenn.) 176.

[72] Gardner v. Board of Health, City of New York, 10 N. Y. 409.

[73] See ante, § 21.

owes its existence to the laws of another country or state. The distinction is not based upon any difference in the nature of corporations, but upon status merely.[74]

§ 36. Statutory classification of corporations.

(a) In general.—In a number of states the corporation laws not only classify corporations as shown in the preceding sections, but go further and classify them, according to their nature or objects, into "moneyed" corporations, "business" corporations, "transportation" corporations, "manufacturing," "trading," and "mercantile" corporations, "religious," "charitable," or "benevolent" corporations, corporations for "internal improvement," or "public utility," corporations for "industrial pursuits," etc. Corporations are also thus variously classified or referred to in other statutes relating to corporations, such as statutes taxing corporations, or exempting them from taxation, statutes imposing a liability upon stockholders or officers, bankruptcy and insolvency laws, etc. The courts, therefore, are frequently called upon to construe such terms, and to determine whether or not they apply to particular corporations. Such of these terms as are most frequently met with will be briefly considered, and the decisions in which they have been construed collected, in the following subsections:

(b) How the character of a corporation is determined.—The character of a corporation—whether it is a "manufacturing" corporation, or a "trading" corporation, or a "benevolent" corporation, etc.—is to be determined solely from its charter. The first thing is to ascertain the meaning of the particular descriptive term, and then determine whether the purposes of the corporation, as shown by its charter, bring it within such terms.[75]

Where the powers of a corporation set forth in its articles of association or certificate of incorporation are such as to bring it within the class of corporations covered by a particular stat-

[74] See post, chapter xxvi.

[75] Nicholson's Succession, 37 La. 633; State v. Minnesota Thresher of Christian Science, 27 Mo. App. Ann. 346; In re St. Louis Institute Mfg. Co., 40 Minn. 213.

ute, it is within such class, although the articles or certificate may recite that it was organized under a statute authorizing the formation of a different class of corporations.[76]

(c) "Trading" corporations.—"Trading" corporations, or corporations "for trade or commerce," within the meaning of a statute, include, unless there is something to show a contrary intent, all corporations engaged in a business, or authorized to engage in a business, which properly falls within the definition of trade and commerce.[77] Any person who buys and sells goods, or any other property which is the subject of trade and commerce, as a business, for the purpose of making a profit, is a "trader,"[78] and any corporation engaged in such a business is a trading corporation, or corporation engaged in trade.[79] "The character of a trader embraces a wide field of operation. It is of no consequence in what one may trade, the only question is, does he buy and sell articles which are subject to trade and commerce?"[80]

It seems that, strictly speaking, there must be both a buying and selling to constitute one a "trader," and that a corporation which owns a mine, or a source of water supply, etc., and merely sells the product therefrom, is not engaged in trade and commerce.[81] If a mining company, however, buys coal or ore from other companies or persons, and sells it again, it is to that extent a trading corporation, although not exclusively engaged in trade.[82] It would also seem clear that a water company

[76] State v. Minnesota Thresher Mfg. Co., 40 Minn. 213. See post § 47(d).

In McComb v. Belknap, 30 Abb. N. C. (N. Y.) 119, it was held that the fact that a certificate of incorporation recited that it was under the manufacturing corporations' act, when the corporation was of a character not authorized by that act, did not bring it within the provisions of the act.

[77] In re San Gabriel Sanatorium Co., 95 Fed. 271; In re Cowles, 1 N. B. R. 280, Fed. Cas. No. 3,297.

[78] See In re Cowles, 1 N. B. R. 280, Fed. Cas. No. 3,297.

In determining whether one is a trader, the amount of the trading and the amount of the profit is immaterial. If there is a buying and selling for a profit, it is sufficient. See Newland v. Bell, Holt, N. P. 221; Ex parte Moule, 14 Ves. 602; Holroyd v. Gwynne, 2 Taunt. 176.

[79] In re San Gabriel Sanatorium Co., 95 Fed. 271.

[80] In re Kenyon, 1 Utah, 47.

[81] In re New York & Westchester Water Co., 98 Fed. 711, affirmed in 102 Fed. 1004, on the opinion of the court below.

[82] Turner v. Hardcastle, 11 C. B. (N. S.) 683.

which, in addition to owning a source of supply and furnishing water therefrom to its customers, also purchases water from another company or person at a certain price per gallon, and furnishes it to customers, or a gas company so purchasing and selling gas, would be engaged in trade to the extent of such purchase and sale.[83]

It was recently held that a corporation which conducted a private hospital for the cure of consumptives, and which charged for treatment, board, etc., and sold cigars and other articles to its customers, was principally engaged in trading, within the meaning of the bankruptcy act.[84] And in a California case it was held that ice companies, gas companies, and water companies, intended to supply a city and its inhabitants respectively with ice, gas, and water, were within a statute providing for the formation of corporations "for the purpose of engaging in any *species* of trade or commerce,"[85] although it was said that they

[83] It was held by Judge Brown, in the district court for the southern district of New York, that a water company was not engaged in trade, within the meaning of the bankruptcy law, although the evidence showed that it had purchased 500,000 gallons per day of its supply from the city of New York at an agreed price of ten cents per 1,000 gallons; and his decision was affirmed by the circuit court of appeals. In re New York & Westchester Water Co., 98 Fed. 711, affirmed 102 Fed. 1004. The fact that water was purchased as above stated appears in the record of the case, although not in the report or opinion.

The soundness of this decision may well be doubted, when it is considered that one who buys and sells goods, or any property which is the subject of trade and commerce, is a trader; that water and gas, when confined in pipes, are "personal goods," within the definition of larceny, Ferens v. O'Brien, 11 Q. B. Div. 21, 15 Cox, Cr. Cas. 332; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706; Hutchison v. Com., 82 Pa. St. 472; State v. Wellman, 34 Minn. 221; and the subject of trade and commerce, Dudley v. Jamaica Pond Aqueduct Corp., 100 Mass. 184; People v. Blake, 19 Cal. 579. See note 85, infra.

[84] In re San Gabriel Sanatorium Co., 95 Fed. 271.

[85] People v. Blake, 19 Cal. 579. The decision in this case was that a waterworks corporation, organized for the purpose of supplying the city of San Francisco and its inhabitants with water, was within a statute providing for corporations "for the purpose of engaging in any species of trade or commerce." The court said: "It was to deal in water as a matter of business—to furnish the article to consumers upon considerations to be received—that the company was formed. Water, when collected in reservoirs or pipes, and thus separated from the original source of supply, is personal property, and is as much the subject of sale —an article of commerce—as ordinary goods and merchandise. Engaging in the business of furnishing it to the inhabitants of a city for equivalent considerations

were not within the technical acceptation of the terms "trading" or "commercial" corporations.

Corporations for "trade and commerce" have also been held to include a corporation for buying and selling stocks, bonds, and public securities;[86] and a corporation for the purpose of "buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building."[87] And a corporation for the "purchase of swamp and overflowed lands and adjacent high lands, * * * the construction of dykes, levees, canals, reservoirs, and other works," was held to be within a statute authorizing corporations for manufacturing, or mining, or for "engaging in any other species of trade, business, or commerce."[88]

(d) "Mercantile" or "commercial" corporations.—The phrase "mercantile business," or "commercial business," "refers to the buying and selling of articles of merchandise as an employment. It implies operations conducted with a view of realizing the profits which come from skillful purchase, barter, speculation, and sale," and is therefore practically synonymous with "trading."[89]

It has been held that the term "mercantile partnership"—and the same would be true of "mercantile corporation"—does not properly include an association which mines and sells ore and coal from its own lands, or which sinks oil or gas wells and sells their products.[90] A mutual insurance company is

to be received is engaging in a species of trade or commerce within the meaning of the act." The dictum also includes ice companies and gas companies. It is said, however, that they are not "in the technical acceptation of the terms, 'trading' or 'commercial' corporations" See note 83, supra.

[86] In re Pittsburg Stock Exchange, 26 Pittsb. Leg. J. (N. S.; Pa.) 308.

[87] Finnegan v. Norenberg, 52 Minn. 239, 38 Am. St. Rep. 552.

[88] People v. Hager, 52 Cal. 171, 184.

[89] Graham v. Hendricks, 22 La. Ann. 522. And see In re New York & Westchester Water Co., 98 Fed. 711, 102 Fed. 1004; In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co., 96 Fed. 756.

[90] Com. v. Natural Gas Co., 32 Pittsb. Leg. J. (Pa.) 310. And see ante, § 36(c).

not engaged in mercantile pursuits, within the meaning of the bankruptcy law.[91]

"The word 'mercantile,' in its ordinary acceptation, pertains to the business of merchants, and has 'to do with trade or the buying and selling of commodities.' A merchant is one who traffics, or who buys and sells goods or commodities. He would be a merchant if his business consisted in buying without selling, and he might be a merchant by simply selling. The term 'mercantile pursuit' necessarily carries with it the idea of traffic,—the buying of something from another, or the selling of something to another,—and is allied to trade."[92]

(e) **"Manufacturing" corporations.**—"Manufacture" has been defined as "the operation of making goods or wares of any kind; the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery."[93] "The process of manufacture is supposed to produce some new article by the application of skill and labor to raw material."[94] The mere appropriation of an article which is furnished by nature, or the buying and selling of an article without changing its character, is not a manufacture, and a corporation engaged therein is not a manufacturing corporation.

It has been held, therefore, that "manufacturing corporations" do not include corporations engaged in liberating natural gas or oil from the earth and transporting it to consumers;[95] corporations engaged in mining and selling coal or ores;[96] aqueduct or other corporations engaged in taking water from a natural source and distributing it through ditches or pipes.[97] And

[91] In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co., 96 Fed. 756.

But an insurance company was held to be a "business or commercial" corporation, within the bankruptcy act of 1867. In re Independent Ins. Co., 1 Holmes, 103, Fed. Cas. No. 7,017.

[92] Phillips, J., in Re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co., 96 Fed. 756, 757.

[93] Century Dict. & Cyc. "Manufacture."

[94] People v. Roberts, 145 N. Y. 375, 377.

[95] See Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105, 117.

[96] Byers v. Franklin Coal Co., 106 Mass. 131. See, also, People v. Horn Silver Min. Co., 105 N. Y. 76.

[97] Dudley v. Jamaica Pond Aqueduct Corp., 100 Mass. 183.

some courts, though not all, have held that they do not include corporations collecting and selling ice formed by natural causes.[98]

It has also been held that manufacturing corporations do not include corporations for the purpose of publishing a daily newspaper, although they also carry on a general jobbing, printing, and publishing business;[99] a corporation for the purpose of constructing and providing docks for building, raising, and repairing vessels and steamers;[100] a corporation for the purpose of constructing and repairing vessels;[101] a corporation for purchasing sheep and lambs, slaughtering them, pulling the wool from the hides, converting the offal into fertilizer, reducing the carcasses to a temperature which will retard decomposition, and shipping them to places of delivery;[102] or a corporation engaged in the sale of spices, baking powder, coffee, and tea, not manufactured by it, but purchased by it in bulk, although it puts up the spices and baking powder in packages for sale, mixes different kinds of tea together, puts them in packages, and sells them as "combination tea," and purchases coffee raw and roasts and grinds it.[103]

On the other hand, the expression "manufacturing corporations," or corporations for "manufacturing purposes," clearly includes a corporation for making and selling lumber or flour and meal;[104] corporations for the purpose of making illuminat-

[98] See infra, this subsection.

[99] Evening Journal Ass'n v. State Board of Assessors, 47 N. J. Law, 36, 54 Am. Rep. 114. Compare In re Kenyon, 1 Utah, 47.

A corporation which publishes a newspaper, but which does not own or operate any plant for printing it, and takes no part in printing it further than to have a foreman, who watches the work as it progresses in the hands of a contractor, by whom the type is set and the paper printed at a price agreed upon, is not a manufacturing company. People v. Roberts, 19 App. Div. (N. Y.) 632, 155 N. Y. 1.

[100] People v. New York Floating Dry Dock Co., 63 How. Pr. (N. Y.) 451, 92 N. Y. 487.

[101] People v. New York Floating Dry Dock Co., 63 How. Pr. 451, 92 N. Y. 487.

[102] People v. Roberts, 155 N. Y. 408, reversing 20 App. Div. 521.

It was held, however, in Engle v. Sohn, 41 Ohio St. 691, 52 Am. Rep. 103, that a porkpacker—a person engaged in the business of purchasing and slaughtering hogs, curing the meat, packing the same, and selling it—was a manufacturer. Compare Jackson v. State, 15 Ohio, 652.

[103] People v. Roberts, 145 N. Y. 375.

[104] Cross v. Pinckneyville Mill Co., 17 Ill. 54.

ing gas or electricity, and furnishing the same to consumers for lighting, heating, or power,[105] unless there is something to show that the legislature did not intend to include them;[106] and corporations for the purpose of making and selling artificial ice.[107]

In Michigan it has been held that a corporation for the purpose of collecting natural ice, and selling the same after reducing it by manual labor or machinery to a form adapted to sale and use, is a manufacturing corporation.[108] The contrary, however, was held in New York, on the ground that this is merely the selling of a natural product.[109]

It has also been held that "manufacturing" corporations include a corporation "to conduct and prosecute the business of book printing and job printing, engraving, electrotyping, and lithographing," whose capital is invested in that business, and which manufactures only on orders;[110] a corporation for the purpose of carrying on the business of "publishing books, and of printing and book binding;"[111] a corporation for manufacturing all kinds of lumber, and the sale of the same, and the purchasing and selling of mills, lands, standing timber, logs, and lumber, for the purpose of such business;[112] and a corporation for the purpose of "refining and preparing for use oil, coal, and other minerals."[113]

A particular statute may use the term "manufacturing," in reference to corporations, in a different sense from that given by lexicographers, and of course the intention of the legislature

[105] Nassau Gas Light Co. v. City of Brooklyn, 89 N. Y. 409, 25 Hun, 567; Com. v. Allegheny Gas Co., 1 Dauph. Co. Rep. (Pa.) 93; Beggs v. Edison Electric Light & Illuminating Co., 96 Ala. 295, 38 Am. St. Rep. 94. And see the dictum in Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105, 117, and Dudley v. Jamaica Pond Aqueduct Corp., 100 Mass. 183, 184.

[106] See infra, this subsection.

[107] See the dictum in Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105, 117.

[108] Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287.

[109] People v. Knickerbocker Ice Co., 99 N. Y. 181. And see the dictum in Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105, 117.

[110] Evening Journal Ass'n v. State Board of Assessors, 47 N. J. Law, 36, 54 Am. Rep. 114. See, also, In re Kenyon, 1 Utah, 47.

[111] Com. v. J. B. Lippincott Co., 156 Pa. St. 513; Com. v. Wm. Mann Co., 150 Pa. St. 64.

[112] Wagner v. Corcoran, 2 Pa. Dist. Rep. 440.

[113] Howes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

must govern. Thus, in Pennsylvania it was held that a corporation organized for the purpose of supplying light, heat, and power by means of electricity was not a "manufacturing corporation," within the meaning of a statute of that state exempting such corporations from taxation, although it was conceded that its operations might be within the definition of "manufacture" given by lexicographers.[114]

If the business of a corporation is not manufacturing, the fact that it does a trifling or insignificant amount of manufacturing will not make it a manufacturing corporation, within the meaning of a statute. In a late Minnesota case it was held on this ground that the stockholders of a corporation were not exempt from liability for its debts under a statute or constitutional provision exempting the stockholders of manufacturing corporations, where it was evident, not only from its articles of association, but also from the business actually transacted, that its primary object was to carry on a business wholly foreign to manufacturing,—the buying, selling, shipping, and storing of grain, building materials, cattle, etc.,—although an insignificant part of its business was the manufacturing of flour and feed.[115]

(f) "Transportation" corporations.—A "transportation" corporation, as the term is generally understood, is a corporation engaged in the carriage or transportation of passengers, or of goods belonging to others, for hire or reward, as in the case of

[114] Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105. See, also, Com. v. Edison Electric Light & Power Co., 170 Pa. St. 231; Com. v. Keystone Electric Light, Heat & Power Co., 4 Lack. Leg. N. (Pa.) 353, 2 Dauphin Co. Rep. 1.

[115] Mohr v. Minnesota Elevator Co., 40 Minn. 343.

A corporation organized not only for the purpose of mining, but also for the business of "buying and selling and dealing in mineral lands," is not within the Minnesota constitutional provision relating to corporations organized for manufacturing or mechanical business. Holland v. Duluth Iron Mining & Development Co., 65 Minn. 324, 60 Am. St. Rep. 480. See, also, St. Paul Barrel Co. v. Minneapolis Distilling Co., 62 Minn. 448; Anderson v. Anderson Iron Co., 65 Minn. 281.

A corporation whose articles of incorporation state that "its business shall be the manufacturing of clothing of every description, and the sale of clothing so manufactured, and the transaction of all other business necessary and incidental to such manufacture and sale of clothing," is a manufacturing corporation exclusively. Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334.

a railroad company, steamboat company, express company, and the like. To render a corporation a "transportation" company, however, it need not necessarily *carry* the goods, as in the case of a railroad or express company. It is sufficient if it transports or removes them by other means. It has been held, therefore, that a corporation engaged in the removal of petroleum from place to place, for hire, by means of pipes, is a transportation company, within the meaning of a statute taxing such corporations.[116] The same is true of a corporation engaged in transporting natural gas in pipes.[117]

In a late case in the federal court it was held by Judge Brown that a water company furnishing water to consumers through pipes, from its own source of supply, was a "transportation" company;[118] but this construction cannot be sustained. The term, as commonly used, is confined to corporations engaged in the business of transporting either passengers, of goods *belonging to others,* or both, and does not include corporations which merely transport their own goods to purchasers. According to the decision referred to, the term "transportation company" would include a trading corporation transporting its goods to purchasers in wagons. In an Ohio case (in the circuit court) it has been held that a corporation organized for the purpose of constructing waterworks, and supplying a city and its inhabitants with water from a source of supply owned by it, is not a transportation company, within the meaning of a statute giving to corporations organized for the purpose of transporting petroleum, water, etc., the power of eminent domain.[119]

In New York the law known as the "Transportation Corporations Law" includes, by its express terms, ferry corporations, navigation corporations, stage-coach corporations, tramway corporations, pipe-line corporations, gas and electric light corpora-

[116] Columbia Conduit Co. v. Com., 90 Pa. St. 307. See, also, West Virginia Transp. Co. v. Volcanic Oil & Coal Co., 5 W. Va. 382.

[117] Carothers v. Philadelphia Co., 118 Pa. St. 468, 474.

[118] In re New York & Westchester Water Co., 98 Fed. 711, 102 Fed. 1004.

[119] "It is well known," said the court, "that the object of transportation companies is to carry or convey property from one place to another, for hire, by means of

tions, waterworks corporations, telegraph and telephone corporations, and turnpike, plankroad, and bridge corporations. It is clear, however, that, properly speaking, some of these are not transportation corporations at all, in any sense,—as, for example, turnpike, plankroad, and bridge corporations, and gas, water, and electric light companies.

(g) Corporations for "industrial pursuits."—The expression "industrial pursuit" is broader than "trading" or "manufacturing." It includes both, and something more. It has been held that a statute authorizing corporations for "industrial pursuits" authorizes a corporation for carrying on the express business,[120] and a corporation for carrying on a mercantile business for the sale of goods, mining supplies, etc.[121]

(h) "Business" corporations.—The word "business" in statutes referring to "business corporations" is not synonymous with "trading," but is much broader, and includes all corporations engaged in business, as distinguished from charitable or benevolent corporations, religious societies, and the like, whatever may be the nature of the business. A railroad corporation was held a business corporation, within the meaning of the bankruptcy act of 1867.[122] Insurance companies, whether fire, life, or marine, are business corporations.[123] And the same is true, of course, of banking, manufacturing, and trading corporations.

In New York, the act known as the "Business Corporations Law" includes stock corporations for any lawful business purpose or purposes other than a moneyed corporation, or a corporation provided for by the banking, the insurance, the railroad, and the transportation corporation laws. It is clear, however, that corporations formed under these laws are business corporations.

(i) Corporations for "pecuniary profit."—A corporation "for

conveyances," etc. State v. Salem Water Co., 5 Ohio Cir. Ct. R. 58.

[120] Wells, Fargo & Co. v. Northern Pac. Ry. Co., 23 Fed. 469.

[121] Bashford-Burmister Co. v. Agua Fria Copper Co. (Ariz.) 35 Pac. 983. See, also, Carver Mercantile Co. v. Hulme, 7 Mont. 566.

[122] Adams v. Boston, Hartford & Erie R. Co., Holmes, 30, Fed. Cas. No. 47; Winter v. Iowa, Minnesota & N. P. R. Co., 2 Dill. 487, Fed. Cas. No. 17,890.

[123] In re Independent Ins. Co., Holmes, 103, Fed. Cas. No. 7,017; In re Hercules Mut. Life Assur. Soc., 6 Ben. 35, 5 Am. Law T. Rep. 400, Fed. Cas. No. 6,402.

pecuniary profit" is a corporation organized for the pecuniary profit of its stockholders or members.[124] Banking corporations, manufacturing and trading corporations, railroad companies, water and gas companies, and the like, which pay or are expected to pay dividends, clearly come within this class. It is equally clear that incorporated hospitals, asylums, and other eleemosynary corporations and incorporated religious societies or congregations do not come within this class.[125]

An incorporated academy, or other corporation for educational purposes, which declares no dividends, and pays no money to its members, but is conducted solely for educational and charitable purposes, is not a corporation for pecuniary profit, although it may charge fees for tuition.[126]

An incorporated board of trade is not a corporation for pecuniary gain, for the "organization is not maintained for the transaction of business or for pecuniary gain, but simply to promulgate and enforce amongst its members correct and high moral principles in the transaction of business. It is not engaged in business, but only prescribes rules for the transaction of business."[127]

(j) "Moneyed" corporations.—The term "moneyed" is applied to certain corporations in some states. In New York, "moneyed" corporations are defined by statute to be corporations formed under or subject to the banking or the insurance law, and they include every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make contracts of insurance.

(k) "Banking" corporations—Trust companies.—A banking corporation is a corporation authorized to receive deposits of money, to lend money, discount commercial paper, and generally, although not necessarily, to issue notes to circulate as money.

[124] Saint Clara Female Academy v. Sullivan, 116 Ill. 375, 387.

[125] See McDonald v. Massachusetts General Hospital, 120 Mass. 432; Saint Clara Female Academy v. Sullivan, 116 Ill. 375; People v. Board of Trade of Chicago, 80 Ill. 134.

[126] Saint Clara Female Academy v. Sullivan, 116 Ill. 375, 387.

[127] People v. Board of Trade of Chicago, 80 Ill. 134, 136.

The term includes savings banks.[128] In an Illinois case it was said, in substance, that banks, in a commercial sense, are of three kinds, namely, banks of deposit, banks of discount, and banks of circulation; and it was held that an incorporated savings association, authorized by its charter to receive deposits, discount notes, and invest the funds in its hands in public securities, and to declare credits or dividends, must be regarded as having banking powers, although it had no stockholders.[129]

Such corporations are distinguishable from trust companies in that the deposits of the latter are strictly loans or trust funds, and not subject to check, that they cannot issue their notes for circulation, that they do not buy and sell exchange in the ordinary course of their business, and that they are authorized to engage in real-estate transactions, trusteeships, and other business not included within the powers of banking corporations.[130] The fact that a trust company exercises some of the functions of a bank with or without authority does not make it a banking corporation.[131]

(l) **"Beneficial" corporations.**—"Beneficial" associations or corporations are associations organized for the purpose of the mutual benefit or protection of their members.[132] They include, for instance, a society formed for the purpose of rendering assistance to members or their families in case of sickness,

[128] See Reed v. People, 125 Ill. 592; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; Lyons First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 288, 19 Am. Rep. 181; People v. Doty, 80 N. Y. 225; People v. President, etc., of Manhattan Co., 9 Wend. (N. Y.) 383; Bank for Savings v. Collector, 3 Wall. (U. S.) 495.

[129] Reed v. People, 125 Ill. 592.

[130] State v. Reid, 125 Mo. 43; Wells, Fargo & Co. v. Northern Pac. Ry. Co., 23 Fed. 469; Mercantile Nat. Bank v. City of New York, 121 U. S. 138; Selden v. Equitable Trust Co., 94 U. S. 419. See, also, State v. Louisiana Sav. Co., 12 La. Ann. 568; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531.

[131] State v. Reid, 125 Mo. 43. In this case it was held that a trust company, although it exercised some of the functions of a bank—receiving deposits subject to check—in contravention of its charter, was not within a statute imposing a penalty upon the officers of banking institutions for receiving deposits after the company's insolvency.

[132] Com. v. Equitable Beneficial Ass'n, 137 Pa. St. 412, 419; Com. v. Provident Bicycle Ass'n, 178 Pa. St. 636; State v. Mutual Protection Ass'n, 26 Ohio St. 19. And see post, § 36(m).

and to insure the payment of a certain sum to the widow or dependents of a member on his death.[133]

(m) "Insurance" corporations.— An insurance company or corporation is a corporation for the purpose of making contracts of insurance against loss of property by fire, hail, perils of the sea, or other causes, or against personal injury, or upon life, etc. But corporations commonly known as "beneficial associations," and intended merely for the mutual benefit or protection of their members, are not insurance companies.[134]

Where the purpose of a corporation is the mutual insurance of its members, and no moral or social qualifications are required for membership, but only that the applicant shall be in sound health and of age, it is an insurance company, and it can make no difference that the amount payable by it on the death of a member is not fixed, but depends upon the number of members at that time, and is collected by assessment upon them.[135] On the other hand, a society formed for the purpose of rendering assistance to members or their families in case of sickness, and to insure the payment of a certain sum to the widow or dependents of a member on his death, is not an insurance company.[136] The same is true of a corporation for the purpose of mutual protection of its members against loss by reason of injury to or loss of bicycles;[137] and of a corporation for the purpose of paying a sum of money to a member on his marriage, or to his wife, out of a fund to be raised by the payment by members of initiation fees, annual dues, and assessments.[138]

[133] State v. Mutual Protection Ass'n, 26 Ohio St. 19. See, also, Commercial League Ass'n v. People, 90 Ill. 166; State v. Iowa Mut. Aid Ass'n, 59 Iowa, 125; Com. v. National Mut. Aid Ass'n, 94 Pa. St. 481; Supreme Council of Order of Chosen Friends v. Fairman, 62 How. Pr. (N. Y.) 386. And see post, § 36(m).

[134] Com. v. Equitable Beneficial Ass'n, 137 Pa. St. 412, 419; Com. v. Provident Bicycle Ass'n, 178 Pa. St. 636.

[135] State v. Brawner, 15 Mo. App. 597; Com. v. Wetherbee, 105 Mass. 149; State v. Merchants' Exchange Mut. Ben. Soc., 72 Mo. 146.

[136] State v. Mutual Protection Ass'n, 26 Ohio St. 19; Commercial League Ass'n v. People, 90 Ill. 166; State v. Iowa Mut. Aid Ass'n, 59 Iowa, 125; Com. v. National Mut. Aid Ass'n, 94 Pa. St. 481; Supreme Council of Order of Chosen Friends v. Fairman, 62 How. Pr. (N. Y.) 386.

[137] Com. v. Provident Bicycle Ass'n, 178 Pa. St. 636.

[138] State v. Towle, 80 Me. 287.

(n) Building and loan associations.—An incorporated building and loan association is a corporation for the purpose of raising, by periodical subscriptions of members, a stock or fund to assist members by advances or loans, generally on mortgage security, in building or purchasing homes. In several states the term is defined by statute to include all corporations doing a savings and loan or investment business on the building society plan, viz., loaning its funds to its members or shareholders, and whether issuing certificates of stock which mature at a time fixed in advance or not.

The term does not generally include corporations unless their purpose is to accumulate funds and lend the same to members to assist them in purchasing or building homes, to be held by them in severalty.[139] It does not include a corporation for "the accumulation of a fund by the saving of its members to build or purchase for themselves, respectively, dwelling houses or real estate or to enter into business;"[140] or a corporation for the purpose of purchasing and improving real estate and advancing money on mortgages, etc.;[141] or a corporation for the purpose of buying land with the funds contributed by its members, and then dividing it among them;[142] or a corporation merely for the purpose of loaning money.[143]

(o) "Literary" corporations.—The term "literary" means of or pertaining to letters or learning, and a corporation organized for the purpose of promoting literature and learning is a literary corporation. Any institute or association organized and incorporated for the purpose of conducting a school or seminary

[139] Grimes v. Harrison, 26 Beav. 435; Williar v. Baltimore Butchers' Loan & Annuity Ass'n, 45 Md. 546; Kupfert v. Guttenberg Bldg. Ass'n, 30 Pa. St. 465, 470; Jarrett's Ex'r v. Cope, 68 Pa. St. 67.

A building and loan association may have banking powers, so as to be subject to the law governing banking corporations. See Henderson Loan & Real Estate Ass'n v. People, 163 Ill. 196.

[140] Jarrett's Ex'r v. Cope, 68 Pa. St. 67.

[141] Williar v. Baltimore Butchers' Loan & Annuity Ass'n, 45 Md. 546.

[142] Grimes v. Harrison, 26 Beav. 435.

[143] Kupfert v. Guttenberg Bldg. Ass'n, 30 Pa. St. 465, 470.

of learning, and having that character, is a "literary" corporation or association, within the meaning of a statute.[144]

On the other hand, a corporation not organized for the promotion of literature or learning cannot be classed as a literary association.[145] A corporation for the purpose of disseminating theosophical ideas, and procuring converts thereto, is not a "literary" corporation.[146]

(p) "Scientific" corporations.—The term "science," it has been said, in its broadest sense, is "knowledge," or "the knowledge of many, methodically digested and arranged, so as to be attainable by one;" a "body of principles and deductions to explain the nature of some matter;" and is not synonymous with, nor does it include, "art."[147] It has been held, therefore, that a rifle club is not a corporation for "scientific purposes;" for rifle shooting, although it may be an art, is not a science.[148] A corporation having for its object the dissemination of theosophical ideas, and procuring converts thereto, is not a "scientific" institution.[149]

In a Michigan case it was said: "A 'scientific institution,' under the language of all civilized countries, means an institution for the advancement or promotion of knowledge, which is the English rendering of 'science;'" and it was held that an educational corporation was a "scientific institution," within the meaning of a statute exempting the property of such institutions from taxation.[150]

(q) "Charitable" and "benevolent" corporations.—Corporations organized for "charitable or benevolent" purposes, within the meaning of a statute, include all corporations organized, not for private gain or profit, but for the administration of charitable trusts, such as hospitals and asylums for the sick, insane, and

[144] Chamberlain v. Chamberlain, 3 Lans. (N. Y.) 348. Compare, however, Reg. v. Pocock, 8 Q. B. 729.

[145] See Reg. v. Jones, 8 Q. B. 725.

[146] New England Theosophical Corp., 172 Mass. 60.

[147] Vredenburg v. Beham, 33 La. Ann. 627. And see Detroit Home & Day School v. City of Detroit, 76 Mich. 521; Jackson v. Waldron, 13 Wend. (N. Y.) 178, 205.

[148] Vredenburg v. Behan, 33 La. Ann. 627.

[149] New England Theosophical Corp., 172 Mass. 60.

[150] Detroit Home & Day School v. City of Detroit, 76 Mich. 521.

poor, and colleges or schools for the promotion of piety or learning.[151]

They do not include corporations organized, not for the administration of a charity, but for the gain or benefit, pecuniary or otherwise, of its members.[152] Thus they do not include a savings institution, the leading purpose of which is the pecuniary profit of its stockholders or members;[153] or a corporation for the promotion of Christian Science, the earnings of which are placed exclusively within the discretion of its directors, and the residuary fund of which is used in compensating its directors for their services;[154] or a corporation having for its primary object the dissemination of theosophical ideas, and procuring converts thereto.[155]

Nor do they include a corporation with a large capital stock, organized for the purpose of enabling members to accumulate, by small monthly contributions, a fund out of which they can secure homes;[156] or a corporation for the purpose of providing a "relief fund," and to "aid persons of moderate pecuniary resources in obtaining from a reputable insurance company insurance on their lives, and in maintaining the necessary payments on the same; and to secure to families of persons so insured an immediate advance of funds in case of death;"[157] or a medical college.[158]

[151] American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112; Hearns v. Waterbury Hospital, 66 Conn. 98; State v. Adams, 44 Mo. 570; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Paterson Rescue Mission v. High (N. J.) 44 Atl. 974. See ante, § 30.

[152] Sheren v. Mendenhall, 23 Minn. 92; Newcomb v. Boston Protective Department, 151 Mass. 215. Compare Fire Insurance Patrol v. Boyd, 120 Pa. St. 624, 6 Am. St. Rep. 745. See ante, § 30, where a number of cases are collected.

In West's Appeal, 64 Pa. St. 186, it was held that a corporation whose charter authorized it "to have, purchase, receive," etc., "stock, goods," etc., "by gift, grant, demise, bargain and sale, devise, bequest, testament, legacy, loan," etc., was a business corporation, and not a charitable corporation, within the meaning of a statute limiting the amount of property of charitable corporations.

[153] Sheren v. Mendenhall, 23 Minn. 92.

[154] In re St. Louis Institute of Christian Science, 27 Mo. App. 633. 633.

[155] New England Theosophical Corp., 172 Mass. 60.

[156] State v. McGrath, 95 Mo. 193.

[157] People v. Nelson, 46 N. Y. 477, 60 Barb. 159, 3 Lans. 394.

[158] People v. Gunn, 96 N. Y. 317.

Building and loan associations,[159] being corporations for private gain, are not "benevolent" associations, within the meaning of a statute, unless the statute expressly includes them.[160]

An association for the purpose of endowing the wife of each member with a sum of money equal to as many dollars as there are members, to be raised by assessment upon the members, is not a benevolent society, for there is no intent to bestow any benefit or help without an equivalent.[161]

(r) "Religious" corporations.—Any corporation whose charter powers are to be used in aid of the propagation and practice of a religious belief is a "religious" corporation.[162] Corporations organized under acts authorizing the incorporation of religious societies or congregations are not to be classified as ecclesiastical corporations,[163] but are civil corporations and subject to the same principles of law, and the same control by the civil courts, as any other civil corporation.[164]

(s) Corporations for "work of internal improvement," "public improvement," or "public utility."—The words "work of internal improvement" in a statute authorizing the formation of a corporation for the purpose of constructing a work of internal improvement, and other statutes referring to corporations by such a description, as statutes giving the power of eminent domain, mean corporations for the purpose of constructing works of a *quasi* public character, as railroads, turnpikes, canals, and the like. "It has been decided time and time again," said the West Virginia court, "and is therefore settled by the best authority, that the construction of railroads, turnpikes, canals, ferries, telegraphs, wharves, basins, etc., creating the necessary facilities for intercommunication, constitutes what is generally known by the name of *internal improvements,* and gives occasion for the exercise of the right of eminent domain."[165] The same is true

[159] Ante, § 36(n).

[160] State v. McGrath, 95 Mo. 193.

[161] State v. Critchett, 37 Minn. 13.

And see Foster v. Moulton, 35 Minn. 458.

[162] In re St. Louis Institute of Christian Science, 27 Mo. App. 633.

[163] See ante, § 29.

[164] Calkins v. Cheney, 92 Ill. 463; Robertson v. Bullions, 11 N. Y. 243.

[165] West Virginia Transportation Co. v. Volcanic Oil & Coal Co., 5 W. Va. 382, 387.

As to railroad companies, see Swan v. Williams, 2 Mich. 427;

of the words "public improvement," and the words "work of public utility," in a statute referring to corporations for such purposes.[166] The fact that a corporation is organized for private gain does not prevent it from being a corporation for a work of public utility or public improvement.[167]

Whether or not a work is a work of public utility necessarily depends to a large extent upon the conditions in the particular locality. What would be a work of public utility in one state or in one part of a state might not be so in another.[168]

The following corporations have expressly or in effect been held to fall within these descriptions: A corporation created for the purpose of constructing and maintaining a pipe line in an oil district for the conveyance or transportation of petroleum for the public generally;[169] a corporation for constructing and maintaining pipes for the conveyance of natural gas to consumers;[170] a gaslight or water company organized for the purpose of constructing and maintaining works, and supplying a city and its inhabitants with gas or water;[171] a corporation for establishing and maintaining a wharf boat and steam elevator for a general storage and forwarding business;[172] a corporation for improving the navigation or the water power, or protection or development of fisheries, in the rivers, streams, and other

Buffalo & New York City R. Co. v. Brainard, 9 N. Y. 100; Stockton & Visalia R. Co. v. City of Stockton, 41 Cal. 147; Tinsman v. Belvidere Delaware R. Co., 26 N. J. Law, 148, 69 Am. Dec. 565.

As to canals, see Tide Water Canal Co. v. Archer, 9 Gill & J. (Md.) 479; In re Townsend, 39 N. Y. 171.

As to turnpike companies, see Kemper's Lessee v. Cincinnati & W. Turnpike Co., 11 Ohio, 392.

[166] Railway Light & Heat Co. v. Elk County, 191 Pa. St. 465; and other cases cited in the notes following.

[167] See the cases cited in the notes following.

[168] See Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Paxton & Hershey Irr. C. & L. Co. v. Farmers' & Merchants' I. & L. Co., 45 Neb. 884, 50 Am. St. Rep. 585; Butte, Anaconda & P. Ry. Co. v. Montana Union R. Co., 16 Mont. 504, 50 Am. St. Rep. 508; Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394.

[169] West Virginia Transp. Co. v. Volcanic Oil & Coal Co., 5 W. Va. 382.

[170] St. Mary's Gas Co. v. Elk County, 191 Pa. St. 458; Ridgway Light & Heat Co. v. Elk County, 191 Pa. St. 465; Bloomfield & Rochester Natural Gas Light Co. v. Richardson, 63 Barb. (N. Y.) 437.

[171] City of Wilmington v. Addicks (Del.) 43 Atl. 297.

[172] Glen v. Breard, 25 La. Ann. 875.

waters of the state;[173] a corporation, in a state in which mining is an important industry, for the purpose of developing and improving such industry;[174] a corporation for constructing irrigating canals, ditches, etc.[175]

[173] Hazen v. Essex Co., 12 Cush. (Mass.) 475, 477; Great Falls Mfg. Co. v. Fernald, 47 N. H. 444; Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Cottrill v. Myrick, 12 Me. 222.

[174] See Butte, Anaconda & Pac. Ry. Co. v. Montana Union R. Co., 16 Mont. 504, 50 Am. St. Rep. 508, and Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394.

[175] Oury v. Goodwin (Ariz.) 26 Pac. 376; Paxton & Hershey Irr. C. & L. Co. v. Farmers' & Merchants' I. & L. Co., 45 Neb. 884, 50 Am. St. Rep. 585.

CHAPTER III.

CREATION, NAME, AND EXISTENCE OF CORPORATIONS; AND THE AMENDMENT, EXTENSION, AND REVIVAL OF CHARACTERS.

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I. Creation of Corporations.

§ 37. How corporations may be created—(a) In general.—Corporations cannot, like a partnership, be formed by mere agreement between the associates. They can be created only by or under special authority from the sovereign or state,—in England from the king or parliament, and in the United States from the state, United States, or territorial legislatures.

(1) In England corporations could be created or exist
- **(a) By common law.**
- **(b) By prescription.**
- **(c) By royal charter.**
- **(d) By act of parliament.**

(2) In the United States they can be created or exist only
- **(a) By prescription.**
- **(b) By or under a royal charter or act of parliament granted or enacted prior to the Revolution.**
- **(c) By or under a statute constitutionally enacted by the legislature of a state, or of the United States, or of a territory of the United States.**

—**Civil law.**—It seems that, under the Roman law, corporations could at one time be created by the mere act and voluntary association of their members, without special authority from the state, subject only to the condition that they should not be contrary to law,[1] but under the empire, and, afterwards, special permission from the state was necessary.[2]

—**In England** no corporation could be created without the consent of the king, either impliedly or expressly given.[3] The

[1] 1 Bl. Com. 472.

[2] Taylor, Corp. § 4.

[3] 1 Bl. Com. 472; Adam's Case, 4 Cooke, 107(b) The city of London had no power to create a corporation. Robinson v. Groscot, Comb. 372.

king's consent was implied in the case of corporations which existed by force of the common law, and to which former kings were supposed to have given their concurrence, the common law being nothing else but custom, arising from the universal agreement of the whole community. Of this sort were the king himself, and all bishops, parsons, vicars, etc.[4] The king's consent was also implied or presumed in the case of all corporations by prescription, as the city of London, for example.[5] The methods by which the king's consent was expressly given to the creation of a corporation were by royal charter, or by an act of parliament, of which the royal assent was an ingredient.[6]

—**In the United States,** as in England, the consent of the sovereign power—the state or the United States, as the case may be, acting through the legislative department—is necessary to the existence of a corporation. Ordinary partnerships, unincorporated societies and clubs, and unincorporated joint-stock companies may be organized by the mere voluntary act and association of the individuals who compose them, under their common-law right to enter into contracts, provided their purpose is not unlawful; but a corporation, however lawful or commendable its purpose, cannot be created by the mere voluntary association of its members. Legislative authority is absolutely essential.[7] A corporation cannot be created by a court.[8] Nor

[4] 1 Bl. Com. 472. See ante, §§ 28, 29; post, § 37(b).

[5] 1 Bl. Com. 473; 2 Inst. 330, post, § 37(c).

[6] 1 Bl. Com. 473; 10 Rep. 29, post, § 37(d).

[7] Franklin Bridge Co. v. Wood, 14 Ga. 80, 1 Smith's Cas. 65, 1 Keener's Cas. 85, 1 Cum. Cas. 42; Hoadley v. Essex County Com'rs, 105 Mass. 519, 1 Keener's Cas. 1; State v. Village of Bradford, 32 Vt. 50; Stowe v. Flagg, 72 Ill. 397; Murphy v. Schuylkill County Farmers' Bank, 20 Pa. St. 415; Pennsylvania R. Co. v. Canal Commissioners, 21 Pa St. 9; Atkinson v. Marietta & Cincinnati R. Co., 15 Ohio St. 21; McKim v. Odom, 3 Bland Ch. (Md.) 407, 416, 418; Chaffe v. Ludeling, 27 La. Ann. 607; Schuetzen Bund v. Agitations Verein, 44 Mich. 313, 38 Am. Rep. 370.

"A corporation not being, like a natural person, one of the elements of society, of which government is formed, can only be considered as a creature of the law. It is the law alone which gives to it a personality distinct from that of each of its members, and confers on it the right to act by its president, directors, or agents, in a manner analogous to that in which the government itself acts by its regularly constituted functionaries. This individuality of character, and the right so to act is, then, nothing more than a por-

can an incorporated college create a department thereof a corporation.[9]

As we shall presently see, the consent of the legislature to the formation of a corporation may be expressed, subject to constitutional limitations, either by a special act granting a charter to particular individuals, or by a general law authorizing any persons to become a corporation upon compliance with certain prescribed conditions.[10]

(b) Corporations by the common law.— In England, certain corporations existed by virtue of the common law. Among these were the king, who was regarded by the common law as a corporation sole for the purpose of preventing a possible interregnum in case of his death, and for the purpose of preserving in succession the possessions of the crown.[11] All bishops, parsons, vicars, church wardens, and the like were also regarded as corporations at common law for the purpose of furthering religion, and of perpetuating the rights of the church.[12]

(c) Corporations by prescription.— A corporation is said to be created by prescription when it has exercised corporate powers for an indefinite period without interference on the part of the sovereign power. By a fiction of law, it is then presumed to have had a charter.[13] In England, the city of London and other corporations are corporations by prescription, for they have existed as corporations for a "time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created.[14] For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one; and that, by the variety of accident which a length of time may produce, the charter is lost or destroyed."[15]

tion of the power of the government with which it has been invested." Per Bland, Chancellor, in McKim v. Odom, 3 Bland Ch. (Md.) 407, 418.

[8] Doboy & Union Island Tel. Co. v. De Magathias, 25 Fed. 697

[9] Medical Institution of Geneva College v. Patterson, 5 Denio (N. Y.) 618.

[10] Post, § 39(c)(4).

[11] 1 Bl. Com. 472; Co. Litt. 43.

[12] 1 Bl. Com. 469, 472; ante, § 29.

[13] 1 Kyd, Corp. 40; Bl. Com. 473; Professor T. W. Dwight, Johnson's Univ. Cyc., "Corporations."

[14] Bl. Com. 473; 2 Inst. 330; Kingston upon Hull v. Horner, 1 Cowp. 102.

[15] Bl. Com. 473.

In the United States there are a number of cases in which the doctrine in relation to corporations by prescription has been recognized and applied both to public and private corporations.[16]

(d) Corporations by royal charter or act of parliament.—In England, corporations were created by royal charter,—that is, by a grant from the king himself. At first this was the only mode in which corporations were expressly created.[17] Afterwards they were also created by act of parliament, of which the royal assent was an ingredient, and to which it was implied.[18]

(e) Corporations by act of the legislature in the United States.—In the United States, in so far as the states are concerned, all legislative power is lodged in the state legislatures, and corporations, therefore, can be created only by or under an act of the legislature.[19] As we shall presently see, corporations may also be created, under some circumstances, by act of congress, and by act of territorial legislatures.[20]

(f) Purchase of franchises.—The mere purchase of the property and franchises of a corporation, although there may be legislative authority for their sale by the corporation, or under foreclosure of a mortgage given by it, does not make the purchasers a corporation, or authorize them to transact business as a corporation. They must be incorporated by or under the authority of an act of the legislature.[21]

(g) Incorporation by several states.—It has been said that several states may unite in creating the same corporation, or in

[16] Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Hager's Town Turnpike Road Co. v. Creeger, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495; Dillingham v. Snow, 3 Mass. 276, 5 Mass. 547; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; People v. Maynard, 15 Mich. 463; White v. State, 69 Ind. 273.

Contra, Griffin v. Clinton Line Extension R. Co., West Law Mag. 31, Fed. Cas. No. 5,816.

[17] 1 Bl. Com. 473. See Durant v. Kennett, L. R. 5 C. P. 262.

[18] 1 Bl. Com. 473; Conservators of the River Tone v. Ash, 10 Barn. & C. 349, 1 Cum. Cas. 23.

[19] McKim v. Odom, 3 Bland Ch. (Md.) 407, 416, 418; Stowe v. Flagg, 72 Ill. 397; Franklin Bridge Co. v. Wood, 14 Ga. 80, 1 Smith's Cas. 65, 1 Keener's Cas. 85, 1 Cum. Cas. 42; Hoadley v. Essex County Com'rs, 105 Mass. 519, 1 Keener's Cas. 1; Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; State v. Armstrong, 3 Sneed (Tenn.) 634; post, § 42; ante, § 37(a).

[20] Post, §§ 40, 41.

[21] Chaffe v. Ludeling, 27 La. Ann. 607; State v. Morgan, 28 La. Ann.

combining several pre-existing corporations into one.[22] As we shall see in another chapter, however, this is not true. It is true that the legislature of one state may create a corporation, like a railroad company, and that another state may make the same collection of individuals a corporation within its limits; or where there are two corporations, each created by a different state, they may be consolidated (in a sense) by concurrent legislation in each state, and in such a case, separate organization is not necessary.[23] It is well settled, however, that *in law* there are two separate and distinct corporations, one in each state, for the laws of a state can have no extraterritorial operation. Two states cannot fuse themselves into a single sovereignty, and, as such, create a corporation of the two states, which is not a corporation of each state, or either.[24]

§ 38. Power of the legislatures in general.—The powers of the state and federal legislatures to create corporations in the United States differ:

(1) The legislature of a state has inherent power to create corporations for any purpose, provided it violates no provision of the state or federal constitution, both of which impose some restrictions.

(2) Congress has the power to create corporations only in so far as such power has been conferred upon it, expressly or impliedly, by the constitution of the United States, for it derives all its powers from this instrument.

(a) Under its power to legislate for the District of Columbia, it has full power to create corporations in the District.

(b) Under its power to legislate for the territories, it has full power to create corporations therein.

(c) Under its power to legislate for the United States, it has the power to create a corporation, if the corporation is necessary or proper in order to carry in-

482. And see Welsh v. Old Dominion Min. & Ry. Co., 56 Hun (N. Y.) 650. See, also, post, § 340.

[22] Copeland v. Memphis & Charleston R. Co., 3 Woods, 651, Fed. Cas. No. 3,209.

[23] See Blackburn v. Selma, Marion & M. R. Co., 2 Flip. 525, Fed. Cas. No. 1,467.

[24] Quincy Railroad Bridge Co. v. Adams County, 88 Ill. 615. And see post, § 117, where many cases are collected.

to execution any power conferred by the constitution upon the government of the United States, or upon any department or officer thereof.

(3) The legislature of a territory has the power to create corporations in the territory, under the general power to legislate for the territory conferred upon it by congress, subject only to such restrictions as are imposed by the federal constitution and by acts of congress. Such power is now expressly conferred by an act of congress.

§ 39. Power of the state legislatures.

(a) In general.—As is stated above, a state legislature has the inherent power to create any corporation it may see fit to create, subject only to such restrictions as are to be found in the federal and state constitutions.[25] It may not only create corporations, but, subject to such restrictions, it may confer upon them, whether they are public or private, any powers it may see fit.[26]

It is been held, however, that a state cannot create a corporation located outside of its own boundaries.[27]

(b) Limitations in the United States constitution.—Of course, it is not within the power of a state to create a corporation for a purpose in violation of the constitution of the United States. On this ground, certain corporations created by southern states have been held invalid because created to aid in the war of the Rebellion.[28] A corporation, however, though created by a southern state during the war, is not now valid, and is not precluded from suing in the federal courts, if the act of incorpora-

[25] Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; Paschall v. Whitsett, 11 Ala. 472; Bell v. Bank of Nashville, Peck. (Tenn.) 269; Bank of Chenango v. Brown, 26 N. Y. 467; United States Trust Co. v. Brady, 20 Barb. (N. Y.) 119; Atkinson v. Marietta & Cincinnati R. Co., 15 Ohio St. 21; City of Aurora v. West, 9 Ind. 74.

[26] In re Philadelphia & Trenton R. Co., 6 Whart. (Pa.) 25, 36 Am. Dec. 202; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Knorr's Appeal, 89 Pa. St. 93; and cases cited in the note preceding. See, also, post, § 39(c)(2).

[27] Wyers v. Manhattan Bank, 20 Ohio, 283.

[28] See Chicora Co. v. Crews, 6 Rich. (S. C.) 243, where a corporation created by the legislature of South Carolina for the purpose of exporting produce, and importing arms and munitions of war, was held to be invalid; and North Carolina Endowment Fund v. Satchwell, 71 N. C. 111, where a North

tion had no relation to anything else than the domestic concerns of the state, and was neither in its apparent purpose, nor in its operation, hostile to the Union or in conflict with the constitution, but was mere ordinary legislation, which would have been valid if there had been no attempted secession and war.[29]

(c) Limitations in the state constitutions—(1) In general.—The limitations imposed by the state constitutions upon the power of the legislature to create corporations, and to confer special powers and franchises upon them, vary in the different states. By the weight of authority, if the legislature, in attempting to create a corporation, violates the state constitution, its action is absolutely void, and no corporation comes into existence, either *de jure* or *de facto*.[30]

——**(2) Form and enactment of statutes.**—Statutes creating or authorizing corporations are subject, of course, to all constitutional provisions which govern generally the form of statutes, and the mode of their enactment.

——**Unity of subject-matter.**—Thus they are within the provision to be found in most of the state constitutions,—that no act shall embrace more than one subject.[31] This provision, however, does not prohibit an act creating or authorizing the formation of a corporation, and also granting a variety of powers, and prescribing the mode in which the various powers conferred shall be exercised.[32] As was said in an Illinois case: "The fact that many

Carolina corporation, created during the war, to provide charity for Confederate soldiers, was held invalid.

[29] United States v. Home & Southern Ins. Co., 22 Wall. (U. S.) 99. See, also, Sapona Iron Co. v. Holt, 64 N. C. 335.

[30] Evenson v. Ellingson, 67 Wis. 634; Burton v. Schildbach, 45 Mich. 504; Eaton v. Walker, 76 Mich. 579; Green v. Graves, 1 Doug. (Mich.) 351; post, § 82(c)(2).

[31] Skinner v. Wilhelm, 63 Mich. 568; Ex parte Conner, 51 Ga. 571; People v. Hamill, 134 Ill. 666.

Under this provision, an act providing for the incorporation of merchants' mutual insurance companies, and regulating the business of merchants' and manufacturers' mutual insurance companies, was held void. Skinner v. Wilhelm, 63 Mich. 568.

The prohibition is violated if an act is amended so as to embrace a purpose outside of its title, and inconsistent with provisions not repealed. Eaton v. Walker, 76 Mich. 579.

[32] Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7; Mahomet v. Quackenbush, 117 U. S. 508; Firemen's Benevolent Ass'n v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; City of Ottawa v. People, 48 Ill. 233; Blake v. People, 109 Ill. 504; People v. Ottawa Hydraulic Co.,

things of a diverse nature are authorized or required to be done, is unimportant, provided the doing of them may fairly be regarded as in furtherance of the general subject of the enactment."[33]

——**Expression of subject-matter in title of act.**—Statutes creating or authorizing corporations are also subject to the constitutional requirement that the subject-matter of an act must be expressed in its title.[34] Under this provision, however, an act creating a corporation need not express in its title all of the various powers conferred upon the corporation, or the various provisions as to the mode in which its business shall be conducted.[35] In other words, the title need not express "the adjuncts to that subject, or the *modus operandi*,"[36] but "any expression in the title which calls attention to the subject of the bill, although in general terms," is sufficient.[37]

115 Ill. 281; Astor v. New York Arcade R. Co., 48 Hun, 562, 113 N. Y. 93; Wardle v. Townsend, 75 Mich. 385; Phillips v. Covington & Cincinnati Bridge Co., 2 Metc. (Ky.) 219; Montgomery Mut. Bldg. & Loan Ass'n v. Robinson, 69 Ala. 413; Phillips v. Town of Albany, 28 Wis. 340.

[33] Blake v. People, 109 Ill. 504.

An act creating an educational corporation does not embrace more than one subject because it prohibits the sale of intoxicating liquors in the neighborhood of the institution. O'Leary v. Cook County, 28 Ill. 534.

[34] Mississippi & Rum River Boom Co. v. Prince, 34 Minn. 79; Astor v. New York Arcade R. Co., 48 Hun, 562, 113 N. Y. 93; People v. Mahaney, 13 Mich. 481; Eaton v. Walker, 76 Mich. 579.

An act entitled, "An act for the incorporation of manufacturing companies," amended so as to authorize the incorporation of manufacturing or mercantile corporations, is, as amended, a violation of this provision of the constitution. Eaton v. Walker, 76 Mich. 579.

[35] O'Leary v. Cook County, 28 Ill. 534; City of Ottawa v. People, 48 Ill. 233; Johnson v. People, 83 Ill. 431; Firemen's Benevolent Ass'n v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Astor v. New York Arcade R. Co., 48 Hun, 562, 113 N. Y. 93; Jones v. Aspen Hardware Co., 21 Colo. 263; Wardle v. Townsend, 75 Mich. 385; Montgomery Mut. Bldg. & Loan Ass'n v. Robinson, 69 Ala. 413; Phillips v. Covington & Cincinnati Bridge Co., 2 Metc. (Ky.) 219; Minnesota Loan & Trust Co. v. Bebee, 40 Minn. 7; Phillips v. Town of Albany, 28 Wis. 340.

[36] City of Ottawa v. People, 48 Ill. 233.

[37] Johnson v. People, 83 Ill. 431.

Thus, an act entitled, "An act to authorize the organization of annuity, safe deposit, and trust companies," does not violate this constitutional provision because it empowers corporations organized under it to act as guardians or trustees, etc. Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7.

Nor is the constitutional provision violated by an act entitled, "An act to incorporate the Northwestern University," because the act prohibits the sale of liquor in

—**Requirement of two-thirds vote.**—In some states the constitution provides that no bill creating any body politic or corporate shall be passed unless with the assent of two-thirds of the members elected to each branch of the legislature.[38] In New York it was held that the purpose of this provision was to prevent the legislature from creating corporations by special act without the assent of two-thirds of the members, and that it did not prevent the passage by a majority vote of general laws authorizing the formation of corporations.[39] The contrary, however, was held by the supreme court of Michigan, and by the supreme court of the United States, construing the constitution of that state.[40]

It has been contended that such a provision prevents the legislature from creating more than one corporation by the same act, even though the act be passed with the assent of two-thirds of the members, and that it prevents, therefore, the passage, even with such assent, of a general law authorizing the formation of corporations. This contention, however, was not sustained.[41]

—**Submission of act to vote of the people.**—There have been constitutional provisions in some jurisdictions prohibiting the legislature from "authorizing corporations" with certain powers, unless the act is submitted to a vote of the people. It has been held that such a prohibition does not prevent the legislature from amending the charter of such a corporation by providing a more speedy remedy to creditors against stockholders.[42]

—**(3) Grant of exclusive franchise or privilege.**—In most states, the constitution prohibits the legislature from granting exclusive franchises or privileges except in consideration of public

the vicinity of the university. O'Leary v. Cook County, 28 Ill. 534.

[38] Such a provision, if general, applies to all corporations, public and private. Purdy v. People, 4 Hill (N. Y.) 384, reversing 2 Hill, 31; DeBow v. People, 1 Denio (N. Y.) 9.

[39] Palmer v. Lawrence, 5 N. Y. 389; Gifford v. Livingston, 2 Denio (N. Y.) 380.

Contra, Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1.

[40] Green v. Graves, 1 Doug. (Mich.) 351; Nesmith v. Sheldon, 7 How. (U. S.) 812; Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4,620. See, also, Hurlbut v. Britain, 2 Doug. (Mich.) 191; Farmers' & Mechanics' Bank v. Troy City Bank, 1 Doug. (Mich.) 457.

[41] Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4,620. And see Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cum. Cas. 1.

[42] Smith v. Bryan, 34 Ill. 364.

services, and where this is the case, a statute, conferring upon private corporations any exclusive privilege, not in consideration of public services, is void.[43] By the weight of authority, however, this prohibition does not prevent the legislature from creating water or gas companies, and conferring upon them the exclusive privilege of constructing works and laying pipe in the streets of a city or village, for the purpose of supplying the village or city and its inhabitants with water or illuminating gas, since this is a public service within the meaning of the exception in the constitution.[44] If there were no such express prohibition in the constitution, it would doubtless be implied from the general declaration of equality of the people, and it would be held that the legislature has no power to confer upon a corporation, any more than upon an individual, an exclusive franchise or privilege, except in consideration of a public service.[45]

——(4) **General and special laws.**—Perhaps the most general constitutional provision affecting the creation of corporations is that which prohibits their creation by special acts. Formerly,

[43] In Kentucky, where the constitution declares that "no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services," it was held that the legislature cannot grant special privileges to a private corporation, except in consideration of public services. And it was therefore held that a clause in the charter of a building association, which authorized it to charge a higher rate of interest than was allowed by the general laws, was unconstitutional and void. Gordon v. Winchester Bldg. & Accum. Fund Ass'n, 12 Bush (Ky.) 110. See, also, Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 20, 34.

[44] Thus, an exclusive franchise or privilege of constructing and operating a street railroad in the streets of a city may be granted to a street railroad company in consideration of its agreement to exercise the franchise, for the operation of the road is a public service. In re Philadelphia & Trenton R. Co., 6 Whart. (Pa.) 25.

Furnishing water or gas to the inhabitants of a municipality and to the municipality is a public service, and if a corporation undertakes on its part to perform such service, the legislature may, in consideration thereof, grant it the exclusive franchise or privilege of constructing and operating works for such a purpose. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Water Co. v. Rivers, 115 U. S. 674; Louisiana Gas Co. v. Citizens' Gas Light Co., 115 U. S. 683.

Such a grant cannot be sustained, however, where the corporation does not assume any obligation to perform the service for the public generally, but has the right under the grant to conduct the enterprise as it may see fit, and to furnish water or gas to whom it may choose. Norwich Gas Light Co. v. Norwich City Gas. Co., 25 Conn. 20, 34.

[45] See the cases above cited.

corporations were created exclusively by special acts,—that is, by acts creating a particular corporation, as distinguished from a general law allowing any persons to organize themselves into and be a corporation by complying with prescribed conditions; and corporations may still be created by special act, in the absence of a constitutional prohibition.[46] Corporations may also be created under the authority of general laws. Such laws are not unconstitutional.[47]

——**Constitutional prohibition.**—In most of the states, in order to remove the danger of favoritism and corruption in the creation of corporations, and for other reasons, the people have adopted constitutional provisions declaring that, with certain exceptions, the legislature shall not pass any special act creating a corporation, but that corporations shall be formed under general laws only; and where there is such a prohibition, a special act creating a corporation is absolutely void.[48] "Every body," said Judge Deady, "who is familiar at all with the history of the growth and organization of corporations in the United States knows that this rule, requiring corporations to be organized under a general law, is the growth of some years, and has grown out of the confusion, corruption, the partial and inequitable legislation that was the result of allowing parties to go before the legislature and ask for a special charter. The time of the legislature was unnecessarily consumed by it; the integrity of the members of the legislature was unduly exposed; or, through the ignorance or carelessness of the legislature, and the astuteness and diligence of designing and overreaching men, there were constantly coming to light obscure clauses in these acts of the legislature, giving powers and granting privileges which were

[46] Downing v. Indiana State Board of Agriculture, 129 Ind. 443.

[47] Post, § 42. Corporations organized under a general law stand upon the same footing as corporations created by direct legislation. Lithgow Mfg. Co. v. Fitch, 5 Ky. Law Rep. 604.

[48] School Dist. No. 56 v. St. Joseph Fire & Marine Ins. Co., 103 U. S. 707; Oroville & Virginia R. Co. v. Plumas County Sup'rs, 37 Cal. 354; City & County of San Francisco v. Spring Valley Water Works, 48 Cal. 493; Low v. City of Marysville, 5 Cal. 214; San Luis Water Co. v. Estrada, 117 Cal. 168; Gilmore v. Norton, 10 Kan. 491; Clegg v. School Dist. No. 56, 8 Neb. 178; and cases cited in the notes following.

unjust, inequitable, and which would never have been done with the knowledge of the legislature."[49]

—**Whether a law is general or special** is to be determined from the law itself, and not from the designation which may be given it by the legislature.[50] An act authorizing the purchasers of the property of a railroad company at a foreclosure sale to organize and form a corporation with the same rights and franchises as are possessed by the company whose property is thus acquired is a special act, within the meaning of the prohibition.[51] And the same is true of an act granting to specified individuals and their assigns certain powers and privileges, to take effect if they shall, within a certain time, organize themselves into a corporation under existing laws.[52]

The fact that an act authorizing the formation of corporations or conferring powers or privileges upon corporations does not apply to every person or corporation in the state does not render the act special, if it has a uniform operation as to all persons similarly situated.[53] In other words, the fact that an act classifies persons who may form a corporation, or the purposes for which corporations may be formed, or the corporations which

[49] Wells, Fargo & Co. v. Northern Pac. Ry. Co., 23 Fed. 469. See, also, City & County of San Francisco v. Spring Valley Waterworks, 48 Cal. 493, 511.

An act granting to certain persons "and their assigns" the exclusive right to supply a town with water, prescribing certain duties, and authorizing the town "to purchase the works and franchises" after a certain time, does not create a corporation, and is not within such a prohibition. San Luis Water Co. v. Estrada, 117 Cal. 168. Compare note 50, infra.

[50] Thus, where a legislature granted to specified individuals and their assigns certain powers and privileges, to take effect if they should, within a certain time, organize themselves into a corporation under existing laws, the act was held special, and therefore unconstitutional, notwithstanding the fact that the legislature, in another act, declared that the first-mentioned act should be considered general. City and County of San Francisco v. Spring Valley Water Works, 48 Cal. 493. See, also, Belleville & Illinoistown R. Co. v. Gregory, 15 Ill. 20. But see note 49, supra.

[51] Atkinson v. Marietta & Cincinnati R. Co., 15 Ohio St. 21.

[52] City and County of San Francisco v. Spring Valley Water Works, 48 Cal. 493. See note 50, supra, and compare note 49, supra.

[53] Attorney General v. McArthur, 38 Mich. 204; Hazelett v. Butler University, 84 Ind. 230; In re New York Elevated R. Co., 70 N. Y. 327.

The prohibition against special laws is not violated by an act limiting the fares to be charged by street railroads in cities having a certain population or more. City of Indianapolis v. Navin, 151 Ind. 139.

shall enjoy powers or privileges granted, does not render it a special act, if the classification is reasonable, and if the act applies to all persons or corporations falling within the particular classes.[54] It is special, however, if it applies to a part only of any particular class, or if the classification is arbitrarily made in order to avoid the constitutional prohibition.[55]

"In order to determine whether or not a given law is general," it has been said, "the purpose of the act and the objects on which it is intended to operate must be considered. If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legistion to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a class by themselves, and legislation affecting such a class, to be general.[56] But if the characteristics used to distinguish the objects to which the legislation applies from others be not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then the classification is incomplete and faulty, and the legislation not general, but local and special."[57]

The constitutional prohibition against special laws was not designed to hinder the legislature from confining the specified work or business of a corporation, by the terms of the law, within a given section of the state in any case when, in consequence of natural conditions, such work or business cannot be carried on elsewhere; and therefore it does not prohibit acts authorizing the formation of corporations for the purpose of operating in cer-

[54] Atlantic City Water Works Co. v. Consumers' Water Co., 44 N. J. Eq. 427.

[55] Frye v. Partridge, 82 Ill. 267; Weinman v. Wilkinsburg & E. L. P. R. Co., 118 Pa. St. 192.

[56] 23 Am. & Eng. Enc. Law (1st Ed.) 148; Long Branch Police Commission v. Sloane, 49 N. J. Law, 356; State v. Borough of Clayton, 53 N. J. Law, 277; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446; Coal Run Coal Co. v. Finlen, 124 Ill. 666.

[57] 23 Am. & Eng. Enc. Law (1st Ed.) 149; Edmonds v. Herbrandson, 2 N. D. 270; Bray v. Hudson County, 50 N. J. Law, 82; Davis v. Clark, 106 Pa. St. 377; Van Riper v. Parsons, 40 N. J. Law, 1.

tain localities only, where the operations are such that they cannot be carried on elsewhere.[58]

——**Exception of particular corporations.**—Some of the state constitutions prohibiting incorporation by special act expressly except corporations of a certain kind,—as, for example, municipal corporations, or corporations having in view the issuing of bills to circulate as money, or the construction of some work of internal improvement, etc. A corporation created for the purpose of constructing and maintaining a pipe line in an oil district for the conveyance or transportation of petroleum for the public generally has been held to be a corporation for constructing a work of internal improvement, within the meaning of such an exception.[59]

——**Exceptions where there is no sufficient general law.**—In some states, while the constitution prohibits incorporation by special act, it makes an exception, and allows such acts, when no general laws exist providing for the creation of corporations of the same general character as the corporation proposed to be created, or where, in the judgment of the legislature, the objects of the proposed corporation cannot be attained under general laws. Under such a provision as this, it is for the legislature to determine whether or not the objects of a proposed corporation can be attained under general laws, and its discretion and judgment in this respect cannot be reviewed by the courts, except where there is a clear abuse of its discretion.[60]

——**Amendment or grant of additional powers.**—In the absence of constitutional restrictions, there is nothing to prevent the legislature from passing a special act modifying, enlarging, or otherwise amending the charter of an existing corporation.[61] In

[58] Attorney General v. McArthur, 38 Mich. 204.

[59] West Virginia Transp. Co. v. Volcanic Oil & Coal Co., 5 W. Va. 382. And see ante, § 36(s).

[60] Mosier v. Hilton, 15 Barb. (N. Y.) 657; United States Trust Co. v. Brady, 20 Barb. (N. Y.) 119; People v. Bowen, 21 N. Y. 517; Carpenter v. People, 8 Colo. 116. See, also, Johnson v. Joliet & Chicago R. Co., 23 Ill. 202; Reed v. Baltimore Trust & Guarantee Co., 72 Md. 531; Gentile v. State, 29 Ind. 409; Evans v. Job, 8 Nev. 322; State v. Boone County Court, 50 Mo. 317; State v. Hitchcock, 1 Kan. 178; Knowles v. Board of Education, 33 Kan. 692, 699. See, however, Pell v. City of New York, 40 N. J. Law, 71.

[61] Wallace v. Loomis, 97 U. S.

some states the constitution expressly prohibits any special act, with certain restrictions, extending, altering, or amending an existing charter, and under such a prohibition, of course, an amendatory special act would be void.

Whether or not a constitutional prohibition against the *creation* or *formation* of corporations by special act prevents the legislature from passing a special act modifying, enlarging, or otherwise amending the charter of an existing corporation is a question upon which the courts have differed in opinion. Some courts have held that such a provision prevents any amendment by special act, unless the case is within some exception in the constitution.[62] Other courts have taken a different view of such a constitutional provision, and have held, on what seems to be the better reasoning, that the intention is merely to prevent the creation of corporations by special act, and that it does not prevent a special act modifying, enlarging, or otherwise amending the charter of an existing corporation, unless the amendment is such as to essentially change the character of the corporation.[63] According to this view, it has been held that the constitutional prohibition does not prevent the legislature from passing a special act which merely changes the name of the corporation, or authorizes the corporation to change it;[64] or a special act which

146; St. Paul Fire & Marine Ins. Co. v. Allis, 24 Minn. 75; Hazelett v. Butler University, 84 Ind. 230.

[62] Atkinson v. Marietta & Cincinnati R. Co., 15 Ohio St. 21; State v. City of Cincinnati, 20 Ohio St. 18; Ex parte Pritz, 9 Iowa, 30; Davis v. Woolnough, 9 Iowa, 104; Town of McGregor v. Baylies, 19 Iowa, 43.

[63] Southern Pac. R. Co. v. Orton, 6 Sawy. 157, Fed. Cas. No. 13,188a, 32 Fed. 457; Wallace v. Loomis, 97 U. S. 146; Gentile v. State, 29 Ind. 409; Wiley v. Bluffton Corporation, 111 Ind. 152; Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372; St. Paul Fire & Marine Ins. Co. v. Allis, 24 Minn. 75; Green v. Knife Falls Boom Corp., 35 Minn. 155; Attorney General v. Joy, 55 Mich. 94; State v. Cape Girardeau & State Line R. Co., 48 Mo. 468; St. Joseph & Iowa R. Co. v. Shambaugh, 106 Mo. 557; Roosa v. St. Joseph & Iowa R. Co., 114 Mo. 508; Attorney General v. North America Life Ins. Co., 82 N. Y. 172; Farnsworth v. Lime Rock R. Co., 83 Me. 440.

[64] Wells v. Oregon Ry. & Nav. Co., 15 Fed. 561; Wallace v. Loomis, 97 U. S. 146; Hazelett v. Butler University, 84 Ind. 230; Attorney General v. Joy, 55 Mich. 94.

"To name a corporation is not to create it any more than to name a person is to create it, nor does it confer on it a special privilege. The privilege of having a name is not thereby monopolized or exhausted, but may be enjoyed by every corporation that has wit enough to devise one, upon the

merely extends the period of existence of a corporation whose charter is about to expire, or has expired;[65] or a special act which, without essentially changing the character of a corporation, confers upon it additional powers or privileges.[66] It has even been held that a change may be made in the character of a corporation by a special act, if the change is not so fundamental as to essentially change its nature and make it a different kind of a corporation. Thus it was held in a Minnesota case that the constitutional prohibition did not prevent the passage of a special act changing the character of an insurance company from a mutual benefit company to a company having a capital stock divided into shares.[67]

Ratification or cure of defects.—The prohibition against creation of corporations by special act renders void and of no effect a special act undertaking, by ratification or recognition, to give corporate existence to a body which has assumed to act as a corporation without any color of authority;[68] but it has been held that it does not prevent the legislature from waiving and curing by special act mere irregularities and noncompliance with conditions in forming corporations under general laws.[69] Where the constitution prohibits the legislature from passing a special act creating corporations, but contains an exception of cases in which the objects of the corporation cannot be attained under general laws, the legislature may by special act cure defects and

same terms." Wells v. Oregon Ry. & Nav. Co., 8 Sawy. 608, 15 Fed. 561.

Where a corporation agreed with a person that, if he would incorporate another company, it would furnish the best of goods to the company so formed, it was held that it was under an obligation to furnish such goods to the company, when it was formed and adopted the contract. Davis Provision Co. v. Fowler Bros., 20 App. Div. (N. Y.) 626, 47 N. Y. Supp. 205; affirmed, without opinion, in 163 N. Y. 580.

In some states, statutes have been enacted rendering valid and binding obligations executed to a prospective corporation in contemplation of its organization. See Cumberland Land Co. v. Daniel (Tenn. Ch. App.) 52 S. W. 446.

[65] Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372.

[66] Wallace v. Loomis, 97 U. S. 146; Attorney General v. North America Life Ins. Co., 82 N. Y. 172; Attorney General v. Joy, 55 Mich. 94; Southern Pac. R. Co. v. Orton, 6 Sawy. 157, Fed. Cas. No. 13,188a, 32 Fed. 457.

[67] St. Paul Fire & Marine Ins. Co. v. Allis, 24 Minn. 75.

[68] Oroville & Virginia R. Co. v. County Com'rs, 37 Cal. 354.

[69] McAuley v. Columbus, Chicago & I. C. R. Co., 83 Ill. 348; Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120;

irregularities in the organization of a corporation under the general laws, and thus render it legal.[70]

——**Prohibition against grant of "corporate powers and privileges."**—In some states the constitution, instead of in terms prohibiting the *creation* or *formation* of corporations by special act, prohibits special acts granting "corporate powers and privileges." An act which granted to individuals and their assigns certain powers and privileges, and then provided that it should not take effect unless the persons to whom the grant was made should, within a certain time, organize themselves into a corporation under existing general laws, was held a grant, not to such persons as individuals, but to the corporation when formed, and was therefore held to be within a constitutional prohibition against conferring powers and privileges upon a corporation by special act.[71]

——**Amendment of charters.**—Some courts have construed such a prohibition literally, and have held that it not only prohibits the creation of a corporation by special act, but also prevents the legislature from passing a special act amending the charter of an existing corporation by conferring upon it additional powers or privileges.[72] Thus it has been held that the prohibition is violated by a special act authorizing an incorporated school district to issue bonds.[73]

The better opinion, however, is against this construction, and to the effect that such a prohibition is aimed at the creation of corporations by special act, and does not prevent a special act

State v. Webb, 110 Ala. 214; Syracuse City Bank v. Davis, 16 Barb. (N. Y.) 188. See post, § 77.

[70] Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; State v. Squires, 26 Iowa, 340.

[71] City and County of San Francisco v. Spring Valley Water Works, 48 Cal. 493.

[72] Atkinson v. Marietta & Cincinnati R. Co., 15 Ohio St. 21; School District No. 56 v. St. Joseph Fire & Marine Ins. Co., 103 U. S. 707; Clegg v. School Dist. No. 56, 8 Neb. 178. And see Gilmore v. Norton, 10 Kan. 491; Green v. Knife Falls Boom Corp., 35 Minn. 155.

In New York it was held that such a provision prohibits the grant of any new privilege by special act, but does not prohibit a special act regulating the exercise of existing powers, franchises, and privileges. In re New York Elevated R. Co., 70 N. Y. 327. See, also, Astor v. New York Arcade R. Co., 48 Hun, 562, 113 N. Y. 93.

[73] Clegg v. School Dist. No. 56, 8 Neb. 178; School Dist. No. 56 v. St. Joseph Fire & Marine Ins. Co., 103 U. S. 707.

amending an existing charter by granting additional privileges. "The words 'corporate powers and privileges,' as here used," said Mr. Justice Gray, speaking of such a prohibition in the constitution of Georgia, "signify the corporate franchise, the aggregate powers and privileges which constitute a corporation, not every separate power and privilege which may be conferred upon a corporate body. The object is to take away from the legislature, and to vest in the courts, under its direction,[74] for the future, the creation of private corporations for literary, religious, charitable, or other purposes, except those specially excepted; but not to prevent the legislature from amending the charters of corporations already existing, and modifying or enlarging their powers, either by repealing former restrictions or otherwise."[75]

In accordance with this view, it has been held that such a prohibition does not prevent a special act changing the name of an existing corporation,[76] or conferring the power to purchase additional property,[77] or to condemn property under the power of eminent domain,[78] or a special act authorizing an incorporated village to issue bonds for waterworks.[79]

——Special acts passed before adoption of constitutional provision.—A constitutional prohibition against the creation of corporations by special act is not retroactive, and therefore it does not affect the existence or validity of corporations fully created by special act prior to its adoption.[80]

[74] The constitution of Georgia declared that the general assembly should have no power "to grant corporate powers and privileges to private companies," with certain exceptions, but should prescribe the manner in which such power should be exercised by the courts. Const. Ga. 1868, art. 3, § 6.

[75] Jones v. Habersham, 107 U. S. 174, 188.

In Wisconsin it was held that the constitutional amendment prohibiting special laws granting corporate powers or privileges relates only to acts of incorporation thereafter granted, and that it does not prevent such laws in the exercise of the power to alter or repeal charters granted before adoption of the amendment, reserved by the constitution to the legislature. Attorney General v. Chicago & Northwestern Ry. Co., 35 Wis. 425.

[76] Wallace v. Loomis, 97 U. S. 146.

[77] Wallace v. Loomis, 97 U. S. 146.

[78] North River Boom Co. v. Smith, 15 Wash. 138.

[79] Brady v. Moulton, 61 Minn. 185.

[80] State v. Illinois Cent. R. Co., 33 Fed. 730, 769. See City of Atlanta v. Gate City Gas Light Co., 71 Ga. 106.

In Ohio, where the constitution declared that the legislature should pass no special act *conferring corporate powers,* it was held that a special act of incorporation passed before this provision of the constitution was adopted might be accepted by the corporation after its adoption.[81] The contrary was held in Indiana under a constitutional provision declaring that corporations should not be *created* by special act. The constitutional restraint, it was said, "is plainly imposed upon the creation, the organization, of the corporation itself," and the creation of a corporation includes both the offer or grant of a charter by the legislature, and its acceptance by the corporators.[82]

Assignment of franchise.—A constitutional provision that corporations shall be formed under general laws, but shall not be created by special act, does not prohibit the assignment of a franchise to a legally organized corporation by persons having the lawful right to exercise and transfer the same.[83]

§ 40. Power of congress.

(a) In general.— Unlike the state legislatures, congress has no inherent power to create corporations, for its powers of legislation are such only as are conferred upon it by the constitution of the United States. That instrument, in addition to conferring upon congress various specific powers, provides that it shall have the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."[84] Under this provision, congress has the power to create a corporation whenever the corporation is a necessary or proper means for carrying into execution any power which is conferred by the constitution upon the government of the United States, or upon any department or officer thereof.[85] In no other case has it any

[81] State v. Roosa, 11 Ohio St. 16.

[82] State v. Dawson, 16 Ind. 49, 1 Smith's Cas. 69, 1 Keener's Cas. 62, 1 Cum. Cas. 65; Gillespie v. Ft. Wayne & Southern R. Co., 17 Ind. 243; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415, 1 Smith's Cas. 117. Contra, State v. Hancock (Del.) 45 Atl. 851.

[83] Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 339; People v. Stanford, 77 Cal. 360.

[84] Const. U. S. art. 1, § 8.

[85] McCulloch v. Maryland, 4

power to create a corporation when acting as the legislature of the United States.

Under the power conferred by the constitution "to regulate commerce with foreign nations, and among the several states,"[86] congress has the power to create a corporation for the purpose of constructing and maintaining a bridge across a river forming the boundary between two states.[87] And under this power and the power conferred by the constitution to establish post roads, it may create a corporation to construct and maintain a railroad or a telegraph line for the purpose of facilitating interstate commerce, or for the purpose of a post road.[88] In like manner, congress has the power to create or authorize the formation of national banks.[89]

(b) In the District of Columbia.—Since the constitution gives congress exclusive legislative jurisdiction over the District of Columbia, it has the same power to create corporations therein as a state has to create corporations in the state.[90]

(c) In the territories.—Congress also has, under its general constitutional power to legislate for the territories of the United States, the same power to create corporations therein as a state legislature has to create corporations in the state, subject only to such restrictions as are to be found in the federal constitution.[91]

(d) Status of national corporations.—Corporations created by congress are called "national" or "federal" corporations, as distinguished from state corporations. As will be more fully shown in other places, they are not generally residents of any

Wheat. (U. S.) 316; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738; Brown v. Maryland, 12 Wheat. (U. S.) 419; Weston v. City Council of Charleston, 2 Pet. (U. S.) 466; Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29.

[86] Const. U. S. art. 1, § 8.

[87] Luxton v. North River Bridge Co., 153 U. S. 525.

[88] Thomson v. Union Pac. Ry. Co., 9 Wall. (U. S.) 579; Union Pac. R. Co. v. Lincoln County, 1 Dill. 314, Fed. Cas. No. 14,378; California v. Central Pac. R. Co., 127 U. S. 1; Indiana v. United States, 148 U. S. 148; Western Union Tel. Co. v. Union Pac. Ry. Co., 3 Fed. 721.

[89] McCulloch v. Maryland, 4 Wheat. (U. S.) 316; State v. Curtis, 35 Conn. 374, 95 Am. Dec. 263.

[90] Hadley v. Freedman's Sav. & Trust Co., 2 Tenn. Ch. 122; Williams v. Creswell, 51 Miss. 817; Huntington v. National Sav. Bank, 96 U. S. 388; Stoutenburg v. Hennick, 129 U. S. 141; Close v. Glenwood Cemetery, 107 U. S. 466.

[91] See Biddick v. Amelin, 1 Mo. 5; Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539.

particular state,[92] and they are not subject to control by the legislature or courts of a state.[93]

§ 41. Powers of the territorial legislatures.

Congress may not only itself create corporations in the territories of the United States, but it may also authorize the legislature of a territory to do so. Such power, subject to the restrictions in the constitution of the United States, and any restrictions in acts of congress, would be included in a general grant of power to legislate;[94] but the power has been expressly granted. An act of congress provides that the legislatures of the territories "shall not grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable or scientific association."[95] It will be noticed that this act, like the constitutions of most of the states, expressly prohibits the creation of corporations by special act, and requires their formation under general laws.[96]

Admission of territory into the Union.—A corporation created under the laws of a territory becomes a corporation of the state when the territory is admitted into the Union.[97]

[92] Post, § 120.

[93] Post, § 282.

[94] Rogers v. Burlington, 3 Wall. (U. S.) 662; Riddick v. Amelin, 1 Mo. 5; Douglas v. Bank of Missouri, 1 Mo. 24; Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539; Cowell v. Colorado Springs Co., 3 Colo. 82. See, also, Colorado Springs Co. v. American Publishing Co. (C. C. A.) 97 Fed. 843.

[95] Rev. St. U. S. § 1889. See Wells, Fargo & Co. v. Northern Pac. Ry. Co., 23 Fed. 469; Bashford-Burmister Co. v. Agna Fria Copper Co. (Ariz.) 35 Pac. 983.

As to the status of territorial corporations, see post, § 283.

An act of a territorial legislature providing for the organization of corporations cannot be attacked as beyond the power of the legislature, where it has been ratified and confirmed by act of congress since its passage. Colorado Springs Co. v. American Pub. Co., 97 Fed. 843.

[96] Ante, § 39(c)(4).

[97] Vance v. Farmers' & Mechanics' Bank, 1 Blackf. (Ind.) 80; Bank of Vincennes v. State, 1 Blackf. (Ind.) 267; Kansas Pac. R. Co. v. Atchison, Topeka & S. F. R. Co., 112 U. S. 414.

§ 42. Delegation of power to incorporate.

In England.— Though the contrary was held at one time, it was afterwards settled in England that the king might grant to a subject the power to create corporations. The creation of the corporation, however, was regarded as the act of the king through such person as his agent. "He may," said Blackstone, "permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the king that erects, and the subject is but the instrument: for though none but the king can make a corporation, yet *qui facit per alium, facit per se.* In this manner the chancellor of the University of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students."[98]

In the United States, the legislatures cannot delegate their legislative power, for the constitution vests it in them exclusively, and therefore they cannot delegate either to a private individual, or to an officer or court, the power to create or authorize corporations.[99]

Ministerial acts.— The legislatures, however, may themselves authorize the formation of corporations, and empower particular persons, courts, or boards to do ministerial acts that may be necessary to bring corporations into existence.[100] They may, in creating a corporation by special charter, appoint commissioners to carry out particular provisions of the charter, and to

[98] 1 Bl. Com. 474.

[99] Franklin Bridge Co. v. Wood, 14 Ga. 80, 1 Smith's Cas. 65, 1 Keener's Cas. 85, 1 Cum. Cas. 42; State v. Armstrong, 3 Sneed (Tenn.) 634; Ex parte Burns, 1 Tenn. Ch. 83; Medical Institution of Geneva College v. Patterson, 1 Denio (N. Y.) 61, 5 Denio, 618; Doboy & Union Island Tel. Co. v. De Magathias, 25 Fed. 697; Territory v. Stewart, 1 Wash. 98; People v. Bennett, 29 Mich. 451; People v. Town of Nevada, 6 Cal. 143. And see State v. Simons, 32 Minn. 540.

Under the provision of the constitution of Tennessee giving the legislature power to grant such charters of incorporation as they should deem expedient, it was held that the legislature could not confer upon the courts power to grant charters. State v. Armstrong, 3 Sneed (Tenn.) 634.

[100] Franklin Bridge Co. v. Wood, 14 Ga. 80, 1 Smith's Cas. 65, 1 Keener's Cas. 85, 1 Cum. Cas. 42; Heck v. McEwen, 12 Lea (Tenn.) 97, 1 Keener's Cas. 97; Ex parte Burns, 1 Tenn. Ch. 83; Ex parte Chadwell, 3 Baxt. (Tenn.) 98; People v. Chicago Gas Trust Co., 130 Ill. 268; Ames v. Port Huron Log Driving & Booming Co., 6 Mich. 266; People v. Bennett, 29 Mich. 451; In re New York Elevated R. Co., 70 N. Y. 327.

see that the organization of the corporation is in accordance with the conditions of the charter, and issue a certificate of incorporation upon compliance with conditions.[101] And it is well settled that they may constitutionally enact a general law authorizing any persons to organize a corporation by complying with certain conditions, and leave it for some officer or court to determine whether such conditions have been complied with, and, if so, to give a certificate of incorporation.[102]

In a New York case a statute authorizing the creation of elevated and underground railroad corporations was attacked as unconstitutional because it gave commissioners the power to determine, before the creation of such a corporation, the necessity for the proposed railroad, and the power to fix its route and prescribe the plans for its construction. The act, however, was upheld. "The act," it was said by Judge Earl, "rests upon the legislative will, and in no way depends for its vitality upon the action of the commissioners. Corporations organized under the act derive their franchises from the legislature, and in no proper sense from the commissioners. The commissioners perform no legislative acts; they enact no laws; they simply perform administrative acts in carrying the law into effect and applying it."[103]

Mandamus.—Since the powers delegated to officers, boards, or courts by the statutes authorizing the organization of corporations are ministerial, it follows that *mandamus* will lie to compel them to act, and, in a proper case, to grant an order or certificate of incorporation.[104]

§ 43. Words of incorporation and intention to incorporate—(a) In general.—In creating a corporation, no particular form of

[101] Litchfield Bank v. Church, 29 Conn. 137; Granby Mining & Smelting Co. v. Richards, 95 Mo. 106; Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; Napier v. Poe, 12 Ga. 170.

[102] Franklin Bridge Co. v. Wood, 14 Ga. 80, 1 Smith's Cas. 65, 1 Keener's Cas. 85, 1 Cum. Cas. 42; Ames v. Port Huron Log Driving & Booming Co., 6 Mich. 266; Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4,620; Kayser v. Trustees of Bremen, 16 Mo. 88; Granby Mining & Smelting Co. v. Richards, 95 Mo. 106; Greeneville & P. R. N. G. R. Co. v. Johnson, 8 Baxt. (Tenn.) 332.

[103] In re New York Elevated R. Co., 70 N. Y. 327.

[104] Post, § 48(k).

words is necessary. It may be created impliedly by conferring corporate powers, and it may be created by ratification or recognition of a claim of corporate existence.

The legislature may create a corporation either in express terms or impliedly by conferring corporate powers. It may use the word "incorporate" or "corporation," in which case the intention to incorporate is clear, but these or equivalent words are not absolutely essential. If corporate powers and faculties are conferred upon an individual or a collection of individuals by the legislature, this, of itself, is sufficient to make them a corporation,[105] for as was said by Chief Justice Nelson in a New York case, "a corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term 'corporation' in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms."[106]

Where an act authorized the sale of the state canals, and provided that the grantees should "hold and enjoy the same, together with all the rights, privileges, and franchises" of their gran-

[105] 1 Rolle, Abr. 513; Sutton's Hospital Case, 10 Coke, 28, 2 Cum. Cas. 14; Conservators of the River Tone v. Ash, 10 Barn. & C. 349, 1 Cum. Cas. 23; City of Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642; Cincinnati R. Co. v. Com., 80 Ky. 137; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325, 345; Edgeworth v. Wood, 58 N. J. Law, 463; White School House v. Post, 31 Conn. 240; Stebbins v. Jennings, 10 Pick. (Mass.) 172; Mahoney v. Bank of Arkansas, 4 Ark. 620; Reed v. Bank of Arkansas, 5 Ark. 193; Murphy v. State Bank, 7 Ark. 57; Dean v. Davis, 51 Cal. 406; Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; Com. v. West Chester R. Co., 3 Grant's Cas. (Pa.) 200.

"It has been held, that if the king grant land to the men of D., haeredibus et successoribus suis, rendering rent, for anything touching this land they are a corporation. * * * There it is implied, from the word successoribus, that the king intended them to be a corporation." Conservators of the River Tone v. Ash, 10 Barn. & C. 349, 1 Cum. Cas. 23, citing Rolle's Abr. 513. See, also, Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109.

[106] Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1.

tors, who were a corporation, "and under such corporate name as said grantees" might adopt, it was held that an association of individuals purchasing the property became a corporation.[107]

It has even been held that, if all the essential attributes of a corporation are conferred by the legislature upon a body of men, this will make them a corporation in the law, though the legislature may expressly declare that they shall not be deemed a corporation.[108] On the other hand, an express declaration of an intention on the part of the legislature to create a corporation will not have this effect, unless all the essential attributes of a corporation are in fact conferred.[109] Of course an expression of intention on the part of the legislature either to create a corporation, or not to create one, must be taken into consideration, and is entitled to great weight in determining whether or not all the essential attributes of a corporation have in fact been conferred.[110]

If the powers which an association is authorized to exercise are such as may be exercised by an unincorporated association, as well as by a corporation, an intention on the part of the legislature to create a corporation is not to be presumed unless it is clearly shown by the language of the statute.[111]

[107] Delaware Division Canal Co. v. Com., 50 Pa. St. 399.

An act vesting an association with the usual powers of corporations, naming its members as corporators, and providing that the association shall remain a corporation for the purpose of settling its business, clearly shows an intention to create a corporation. Sibley v. Penobscot Lumbering Ass'n, 93 Me. 399.

[108] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Smith's Cas. 1, 1 Cum. Cas. 26, 1 Keener's Cas. 9, affirming Oliver v. Liverpool & London L. & F. Co., 100 Mass. 531; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1; People v. Assessors of Watertown, 1 Hill (N. Y.) 616, 6°0, 1 Smith's Cas. 18; Sandford v. Board of Sup'rs of New York, 15 How. Pr. (N. Y.) 172; ante, § 18.

[109] See Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1.

[110] Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Smith's Cas. 9, 1 Cum. Cas. 5; People v. Coleman, 133 N. Y. 279, 2 Cum. Cas. 2, 1 Keener's Cas. 14.

[111] Shelton v. Banks, 10 Gray (Mass.) 401; Walsh v. Trustees of New York & Brooklyn Bridge, 96 N. Y. 427, 1 Keener's Cas. 64; Myers v. Irwin, 2 Serg. & R. (Pa.) 368; Clark v. Jones, 87 Ala. 474; Gregory's Ex'r v. Shelby College, 2 Metc. (Ky.) 589; State v. Burgess, 23 La. Ann. 225; McRoberts v. Washburne, 10 Minn. 23. See, also, Canal Fund Com'rs v. Perry, 5 Ohio, 56; State v. Davis, 23 Ohio

—**Insufficient statutory provisions.**—Even when ths legislature intends to create a corporation, and uses language showing such intention, it is clear that no corporation can be created by the act unless its provisions are sufficient for the purpose. Mere intention on the part of the legislature is not alone enough. Thus, in a North Carolina case it was held that no corporation was created by a statute enacting "that there shall be a body corporate and politic, known as the 'University Railroad Company,' with corporate powers and franchises to the same extent as are possessed by the North Carolina Railroad Company."[112] And in Tennessee it was held that a statute reciting that a certain person had purchased property for educational purposes, and declaring "that said institution is hereby incorporated under the name of 'Ward's Seminary for Young Ladies,'" was not sufficient as an act of incorporation.[113]

(b) **Recognition of association as a corporation.**—If the legislature recognizes an association as having a corporate existence, either in express terms by ratifying its claims to be a corporation, or impliedly by recognizing the possession of corporate powers, such recognition, unless it violates some constitutional provision, will make the association a corporation, whether it previously had any color of right to exist as a corporation or not.[114]

St. 434; Neil v. Ohio Agric. & Mech. College, 31 Ohio St. 15.

In Myers v. Irwin, 2 Serg. & R. (Pa.) 368, it was held that an act providing that, if any association of citizens should thereafter be formed for banking purposes, each member should be personally liable for its debts, was not an implied incorporation of such an association.

And in Shelton v. Banks, 10 Gray (Mass.) 401, it was held a corporation was not created by a resolve of the executive council of Massachusetts, establishing "a company of artillery" in a town, "agreeably to military law."

A statute granting to certain persons "and their assigns" the exclusive right to supply a town with water, prescribing certain duties, and authorizing the town to purchase all the "works and franchises" after a certain time, does not create a corporation, within a constitutional prohibition against the creation of corporations by special act. San Luis Water Co. v. Estrada, 117 Cal. 168.

[112] University R. Co. v. Holden, 63 N. C. 410.

[113] City of Nashville v. Ward, 16 Lea (Tenn.) 27.

[114] Society for Propagation of the Gospel v. Town of Pawlet, 4 Pet. (U. S.) 480; Kanawha Coal Co. v. Kanawha & Ohio Coal Co., 7 Blatchf. 391, Fed. Cas. No. 7,606; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; People v. Farnham, 35 Ill. 562; McIntire Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio, 203, 34 Am. Dec. 436; Mc-

As we have seen, however, a special act recognizing the existence of an association as a corporation does not make it a corporation in those jurisdictions in which there is a constitutional prohibition against the creation of a corporation except under general laws.[115]

§ 44. Consent of corporators—Acceptance of charter—(a) Necessity for acceptance.—To bring a private corporation into existence, there must be consent on the part of the corporators, as well as the special authority from the state, and a charter from the state, therefore, does not create a private corporation until it is accepted by the corporators in accordance with its terms. Such acceptance, however, may be implied from the exercise of corporate powers under the charter.

A public corporation, being a mere instrument of government, may be created by the legislature without the consent of the members, and therefore, when the legislature charters a municipal corporation, or other public corporation, no acceptance of the charter by the inhabitants or members is necessary. It is very different, however, in the case of a private corporation. To the existence of such a corporation, the consent of the members is essential, and therefore the grant or offer of a charter by the legislature does not create such a corporation until it is expressly or impliedly accepted by the corporators. This is true, whether the offer of a charter is by special act or by a general law.[116] A special act purporting to incorporate cer-

Dougald v. Bellamy, 18 Ga. 412; Williams v. Union Bank, 2 Humph. (Tenn.) 339; Tilden v. Metcalf, 2 Day (Conn.) 259; People v. Perrin, 56 Cal. 345; Western Union Tel. Co. v. Union Pac. Ry. Co., 3 Fed. 74. See, also, post, § 77.

[115] Oroville & Virginia R. Co. v. Plumas County Sup'rs, 37 Cal. 354.

[116] Angell & Ames Corp. § 81; State v. Dawson, 16 Ind. 40, 1 Cum. Cas. 56, 1 Keener's Cas. 62, 1 Smith's Cas. 69; Yeaton v. Bank of Old Dominion, 21 Grat. (Va.) 593, 2 Smith's Cas. 808; Lincoln & Kennebec Bank v. Richardson, 1 Me. 79, 81, 10 Am. Dec. 34; Hudson v. Carman, 41 Me. 84; Ellis v. Marshall, 2 Mass. 269, 3 Am. Dec. 49; Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Mason v. Finch, 28 Mich. 282; State v. Bull, 16 Conn. 197; Quinlan v. Houston & C. Ry. Co., 89 Tex. 356; Smith v. Silver Valley Min. Co., 64 Md. 85, 54 Am. Rep. 760, 1 Keener's Cas. 71; Haslett's Ex'r v. Wotherspoon, 1 Strob. Eq. (S. C.) 209; Green v. Seymour, 35 Sandf. Ch. (N. Y.) 285.

Where the members of a joint-stock association procured the passage by the legislature of an act of incorporation, under a name similar to that of the association,

tain persons, naming them, can only have the effect of incorporating such of the persons named as consent. A person named, but who does not accept or consent, does not become a member of the corporation.[117]

(b) Sufficiency of acceptance.—The acceptance of a charter by the corporators, to be effective, must be in accordance with its terms, for the legislature has a right, both in granting charters by a special act and in offering charters by a general law, to impose any conditions it may see fit. As a general rule, unless these conditions are complied with, an association does not become a corporation *de jure*,[118] though it may become a corporation *de facto*, or a valid corporation as against every person but the state.[119] "The organic life of the corporation depends upon a strict compliance with the conditions imposed, and until this is done there can be no such thing as an acceptance of the charter."[120]

(c) Conditional or partial acceptance.—It follows from this that a charter must be accepted unconditionally and entirely as it is offered. It cannot be accepted on conditions not expressed in it nor implied by law; nor can it be accepted in part only, for, if this were permitted, a corporation might reject the obligations imposed, and accept the benefits conferred.[121]

and voted to accept the act, but no stock was issued as a corporation, no property transferred, nor any meeting held for the election of officers, the association continuing to do business as before the passage of the act, it was held that the association did not become a corporation. Willis v. Chapman, 68 Vt. 459.

[117] Ellis v. Marshall, 2 Mass. 269, 3 Am. Dec. 49; Richmond Factory Ass'n v. Clarke, 61 Me. 351, 358; Gleaves v. Brick Church Turnpike Co., 1 Sneed (Tenn.) 491; Cypress Pond Draining Co. v. Hooper, 2 Metc. (Ky.) 350; Coffin v. Collins, 17 Me. 440; Scuffletown Fence Co. v. McAllister, 12 Bush. (Ky.) 312; Shortz v. Unangst, 3 Watts & S. (Pa.) 45.

[118] Rex v. Westwood, 4 Barn. & C. 781, 7 Bing. 1, 1 Smith's Cas. 71; Lyons v. Orange, Alexandria & M. R. Co., 32 Md. 18; Mississippi Society of Arts & Sciences v. Musgrove, 44 Miss. 820, 7 Am. Rep. 723.

[119] Post, § 80 et seq.

[120] Lyons v. Orange, Alexandria & M. R. Co., 32 Md. 18. See post, §§ 48, 71, 82(f).

[121] Per Chief Justice Tenterden, in Rex v. Westwood, 4 Barn. & C. 781, 7 Bing. 1, 1 Smith's Cas. 71. And see Rex v. Amery, 1 Term R. 589, 2 Term R. 515; Lyons v. Orange, Alexandria & M. R. Co., 32 Md. 18; Baldwin v. Hillsborough & Cincinnati R. Co., 1 Ohio Dec. 532; Mulloy v. Nashville & Decatur R. Co., 8 Lea (Tenn.) 427.

(d) Time of acceptance.—If the offer of a charter fixes a time for acceptance, this is one of the terms of the offer, and an acceptance, to be effectual, must be within the time prescribed.[122] If no time at all is prescribed, the charter must be accepted within what may be regarded as a reasonable time under the circumstances, or it will lapse, and no longer be open for acceptance.[123]

(e) Who may accept.— Since a charter must be accepted according to its terms, a charter can be accepted by those persons only to whom it is granted.[124] And when it is granted to a certain number of persons, it cannot be accepted by a less number.[125]

(f) How acceptance may be evidenced.—In the absence of special requirements in the statute, it is not necessary that the acceptance of a charter shall be shown by a formal act, but it may be shown either by an express act of acceptance, or by implication from the exercise or user of powers under the charter. If a charter is offered to a body of men by either a special or a general law, and no particular form or mode of acceptance is prescribed, no formal vote of acceptance is necessary. An acceptance will be implied or presumed if they proceed to organize a corporation in accordance with the terms of the statute,[126] or if they proceed to exercise the powers which the stat-

[122] State v. Bull, 16 Conn. 179; Bonaparte v. Baltimore, Hampden & L. R. R. Co., 75 Md. 340, 1 Keener's Cas. 77.

[123] State v. Bull, 16 Conn. 179.

[124] Rex v. Amery, 1 Term R. 589, 2 Term R. 515.

[125] Rex v. Amery, 1 Term R. 389; 2 Term R. 515; Montgomery v. Forbes, 148 Mass. 249, 1 Cum. Cas. 69, 1 Smith's Cas. 94, 2 Keener's Cas. 1945. See post, § 46.

When a statute declared that certain persons, their associates and their successors, were made a corporation by the name of the "Athol Reservoir Company," with certain powers, and one person named in the act, apparently without objection by the others, together with seven persons not named in the act, duly met, accepted the act of incorporation, adopted by-laws, elected officers, and transacted other business, it was held that the persons taking part in the proceedings became a corporation under the name of the "Athol Reservoir Company." McGinty v. Athol Reservoir Co., 155 Mass. 183.

[126] Glymont Improvement & Excursion Co. v. Toler, 80 Md. 278; Benbow v. Cook, 115 N. C. 324, 44 Am. Rep. 454; Quinlan v. Houston & T. C. Ry. Co., 89 Tex. 356; Heath v. Silverthorn Lead Mining & Smelting Co., 39 Wis. 146; Logan v. McAllister, 2 Del. Ch. 176.

ute authorizes them to exercise.[127] When a charter is granted by the legislature by a special act to persons who have applied therefor, the application is of itself sufficient evidence of their acceptance.[128] Where a person named in a charter joined the others in signing a call for a meeting for the purpose of organizing the corporation, it was held that this was sufficient evidence of his acceptance of the charter.[129] The presumption that a charter has been accepted from the fact that powers have been exercised under it is a presumption of fact, and not of law, and it may therefore be rebutted by showing that in fact there has not been an acceptance.[130] If the charter requires that the corporators shall signify their acceptance in a particular way, as by a formal vote at a meeting duly called, such an acceptance is necessary.[131]

(g) Place of acceptance.—Since, as we shall see in another chapter, a corporation has no legal existence beyond the juris-

[127] Rex v. Amery, 1 Term R. 575, 2 Term R. 515; Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 75 Fed. 433; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64; Gleaves v. Brick Church Turnpike Co., 1 Sneed (Tenn.) 491; Talladega Ins. Co. v. Landers, 43 Ala. 115; McKay v. Beard, 20 S. C. 156; Perkins v. Sanders, 56 Miss. 733; St. Paul Division No. 1, Sons of Temperance, v. Brown, 11 Minn. 356; Hammond v. Straus, 53 Md. 1; Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Lincoln & Kennebec Bank v. Richardson, 1 Me. 79, 10 Am. Dec. 34; Logan v. McAllister, 2 Del. Ch. 176; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; South Bay Meadow Dam Co. v. Gray, 30 Me. 547; Trott v. Warren, 11 Me. 227; Russell v. McLellan, 14 Pick. (Mass.) 63; Bank of Manchester v. Allen, 11 Vt. 302; Demarest v. Flack, 128 N. Y. 205, 2 Cum. Cas. 9; Taylor v. Newberne Com'rs, 2 Jones Eq. (N. C.) 141; Ameriscoggin Bridge v. Bragg, 11 N. H. 102; Woods v. Banks, 14 N. H. 101; Sumrall v. Sun Mut. Ins. Co., 40 Mo. 27; Dorsey Harvester Revolving Rake Co. v. Marsh, 6 Fish. Pat. Cas. 387, Fed. Cas. No. 4,014. See, also, post, § 57(e).

Acceptance of a charter will be presumed from acceptance of a lease reciting corporate existence, and from condemnation of land under a petition reciting power to do so under the charter. Louisville Trust Co. v. Louisville, N. A. & C. R. Co. (C. C. A.) 75 Fed. 433.

[128] Society of Middlesex Husbandmen & Manufacturers v. Davis, 3 Metc. (Mass.) 133; Perkins v. Sanders, 56 Miss. 733; St. Joseph & Iowa R. Co. v. Shambaugh, 106 Mo. 557; City of Atlanta v. Gate City Gas Light Co., 71 Ga. 106.

[129] Gleaves v. Brick Church Turnpike Co., 1 Sneed (Tenn.) 491.

[130] Newton v. Carbery, 5 Cranch, C. C. 632, Fed. Cas. No. 10,190. And see Hammond v. Straus, 53 Md. 1.

[131] Hudson v. Carman, 41 Me. 84; Shortz v. Unangst, 3 Watts & S. (Pa.) 45; Com. v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

diction of the state by which it was created, and can do no acts outside of the state except such as it may do through its agents,[132] it has been held that a charter must be accepted within the limits of the state by which it is granted, and that, if the corporators or persons named as directors, who are authorized to accept a charter, meet and accept it in another state, the acceptance will have no effect.[133] Since, however, acceptance of a charter may be implied from the exercise or user of corporate powers, without any formal vote or resolution, in the absence of special requirements, acceptance within the state may be implied from the exercise of corporate powers within the state; and in such a case, the fact that there was a formal acceptance at a meeting held in another state is immaterial.[134]

(h) Revocation of acceptance.—By the weight of authority, after a corporation has been fully created by the grant and acceptance of a charter, it cannot be dissolved without the consent of the state.[135] When a charter has once been accepted and powers exercised under it, the obligations and duties imposed by it attach and become absolute, and the acceptance cannot be revoked or withdrawn unless the state consents. It was so held in a leading Massachusetts case, in which a corporation was chartered to erect and maintain dams, canals, and locks. Chief Justice Parsons said: "When the act of incorporation first passed, it was optional with the proprietors, whether they would or would not take the benefit of it, but after they had made their election, by executing the powers granted and claiming the toll, then the duty * * * to make the canals, etc., attached."[136]

When an act of incorporation is accepted, and the corporation organized provisionally under it, no subsequent withdrawal of any of the corporators can affect its validity.[137]

[132] Post, §§ 114 et seq., 131.

[133] Smith v. Silver Valley Min. Co., 64 Md. 85, 54 Am. Rep. 760, 1 Keener's Cas. 71. Contra, Heath v. Silverthorn Lead Mining & Smelting Co., 39 Wis. 146. See post, § 131.

[134] Glymont Improvement & Excursion Co. v. Toler, 80 Md. 278.

[135] Post, § 308.

[136] Riddle v. Proprietors of the Locks & Canals on Merrimack River, 7 Mass. 169. And see Goshen & S. Turnpike Co. v. Sears, 7 Conn. 86.

[137] Busey v. Hooper, 35 Md. 15, 6 Am. Rep. 350.

(i) **Revocation of charter.**—As we shall presently see at some length, when a private charter of incorporation is granted or offered by the state, and accepted by the corporators in accordance with its terms, there is a contract between the state and the corporators, or the corporation as the representative of the corporators in their collective capacity, and the state cannot afterwards revoke or materially alter the charter without the consent of the corporation, unless it has reserved the power to do so, without violating the constitutional prohibition against laws impairing the obligation of contracts.[138] The state may revoke a charter, however, either by a legislative enactment, or by the adoption of a constitutional amendment, at any time before it has been accepted, for until then there is no contract.[139] A charter, therefore, is revoked, and no longer open for acceptance, if, before it is accepted, a constitutional amendment prohibiting such charters is adopted, or if the act of the legislature is repealed.[140]

§ 45. Persons who may become incorporated—In general.—Corporations can be formed by those persons only who are within the terms of the statute. Corporators must have the capacity to contract; but no other qualifications are necessary unless expressly required by the statute. In the absence of provisions in the statute to the contrary, a corporation may be formed.

(1) By nonresidents or aliens, as well as residents and citizens.

(2) By other corporations, as well as natural persons. But a corporation cannot become a member of another corporation unless its charter expressly or impliedly authorizes it to do so.

(3) An infant cannot be a corporator, as he has no capacity to bind himself by contract.

(4) Corporators need not be shareholders unless this is required by the statute.

[138] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Cum. Cas. 490, 2 Smith's Cas. 622.

[139] Mississippi Society of Arts & Sciences v. Musgrove, 44 Miss. 820, 7 Am. Rep. 723; Williams v. State, 23 Tex. 264.

[140] State v. Dawson, 16 Ind. 40, 1 Cum. Cas. 65, 1 Smith's Cas. 69, 1 Keener's Cas. 62; Mississippi Society of Arts & Sciences v. Musgrove, 44 Miss. 820, 7 Am. Rep. 723; Chespeake & Ohio Canal Co. v. Baltimore & Ohio R. Co., 4 Gill & J. (Md.) 1.

Persons not included in statute.—As was shown in a previous section, a charter granted or offered by the legislature must be accepted, if at all, according to its terms, and it can be accepted by those persons only to whom it is granted or offered. When a statute, therefore, authorizes certain persons to organize themselves into a corporation, other persons cannot take their place.[141]

Residence and citizenship.—In most states, the general laws authorizing the formation of corporations expressly provide that a certain number at least of the corporators shall be citizens or residents of the state, and the provision is mandatory.[142] In the absence of an express requirement to this effect, none of the corporators need be either citizens or residents.[143] Where residence only is required, citizenship is not necessary.[144]

Other corporations.—A corporation aggregate "is an artificial intellectual being, the mere creature of the law, composed generally of natural persons in their natural capacity; but may also be composed of persons in their political capacity of members of other corporations."[145] In other words, a corporation need not be composed entirely of natural persons and other corporations, or entirely of other corporations. There are a number of examples of corporations in England whose members were other corporations. The most notable were the great universities of Oxford and Cambridge. These were corporations composed of various colleges which were distinct and separate

[141] Rex v. Amery, 1 Term R. 575, 589, 2 Term R. 515; ante, § 44(e).

[142] In re Enterprise Mut. Beneficial Ass'n, 10 Phila. (Pa.) 380; In re Butchers' Beneficial Ass'n, 35 Pa. St. 151; In re Chinese Club, 1 Pa. Dist. R. 84.

But a corporation may exist de facto, although there were not the number of residents required by law among the corporators. American Salt Co. v. Heidenheimer, 80 Tex. 344, 26 Am. St. Rep. 743. See post, § 82(f).

[143] Moxie Nerve Food Co. v. Baumbach, 32 Fed. 205; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; Demarest v. Flack, 128 N. Y. 205, 2 Cum. Cas. 9; Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186; Humphreys v. Mooney, 5 Colo. 282; Com. v. Detwiller, 131 Pa. St. 614.

[144] Moxie Nerve Food Co. v. Baumbach, 32 Fed. 205; Humphreys v. Mooney, 5 Colo. 282.

[145] University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 395; 1 Kyd, Corp. 32.

corporations.[146] Corporations composed of other corporations are by no means limited to corporations like those above referred to. Ordinarily a corporation, unless expressly authorized, has no power to subscribe for or hold shares in another corporation, for this is generally unnecessary to enable it to accomplish the purposes for which it was created, and a corporation, as we shall see, cannot lawfully engage in transactions which are foreign to the purposes for which it was created.[147] A corporation, however, may be expressly authorized by its charter to acquire and hold shares in other corporations, and it may then do so by subscribing for stock in the organization of another corporation, and thus become a corporator.[148] Statutes providing for the formation of corporations are not to be construed as authorizing other corporations to become corporators, unless such an intention on the part of the legislature is clear.[149]

Infants.—Unless expressly permitted by the statute, an infant cannot become one of the corporators in forming a corporation, for at common law he is incapable of making a binding contract. Infants need not be expressly excluded by the statute, for it will be presumed that the legislature, in authorizing persons to form a corporation, contemplated such persons only as are *sui juris*.[150]

Corporators not shareholders.—The corporators need not be shareholders or subscribers for stock in the proposed corporation, unless it is expressly so required by the statute.[151]

[146] See University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 395.

[147] Denny Hotel Co. v. Schram, 6 Wash. 134, 36 Am. St. Rep. 130; Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Cum. Cas. 343; post, § 193 et seq.

[148] See Iowa Lumber Co. v. Foster, 49 Iowa, 25; In re Asiatic Banking Corp., L. R. 4 Ch. App. 252, 1 Cum. Cas. 359; post, § 193 et seq.

[149] Factors' & Traders' Ins. Co. v. New Harbor Protection Co., 37 La. Ann. 233; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; Denny Hotel Co. v. Schram, 6 Wash. 134, 36 Am. St. Rep. 130; post, § 193 et seq.

[150] In re Globe Mut. Benev. Ass'n, 63 Hun (N. Y.) 263.

[151] In re British Provident L. & G. Ass'n, 5 Ch. Div. 306; Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Bristol Banking & Trust Co. v. Jonesboro Banking & Trust Co., 101 Tenn. 545.

§ 46. Number of corporators.—No particular number of corporators is necessary in the formation of a corporation, unless a certain number is expressly or impliedly required by the statute.

In the absence of constitutional prohibitions, there is nothing to prevent a state from creating or authorizing a corporation composed of a single person only.[152] In a Maine case it was held that a grant of corporate powers to one person, *and his associates and successors,* did not require of such person that he should take associates before the act could take effect, or corporate powers be exercised, but that it virtually conferred upon him alone the right to exercise all the corporate powers thereby granted. The grant being to one person, without restriction, said the court, "the inference necessarily is that it was the intention of the legislature to permit that one person or his successor to exercise all the corporate powers, and to make his acts, when acting upon the subject-matter of the corporation and within its sphere of action and grant of power, the acts of the corporation."[153]

Though the state may create a corporation consisting of a single member only, it is not considered consistent with public policy to do so in the case of a private corporation; and for this reason, the statutes authorizing the formation of corporations almost invariably require a certain number of corporators. When this is the case, the provision is mandatory, and a corporation cannot be legally formed by less than the prescribed number, for, as we have seen, a charter cannot be accepted by a part only of the persons to whom it is granted or offered.[154] Where a statute provided that "*any* number of per-

[152] Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656. See ante, § 28.

[153] Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656. And see Hughes v. Parker, 20 N. H. 58; Workingmen's Bldg. & Loan Ass'n v. Coleman, 89 Pa. St. 428.

Where a person takes the entire capital stock of a corporation, but allots four shares to four employes, the corporation is validly formed if the requirements of the statute are substantially complied with. Pott & Co. v. Schmucker, 84 Md. 535.

[154] Ante, § 44(e); Rex v. Amery, 1 Term R. 589, 2 Term R. 515. Broderip v. Salomon [1895] 2 Ch. Div. 323; Montgomery v. Forbes, 148 Mass. 249, 1 Smith's Cas. 94, 2 Keener's Cas. 1945, 1 Cum. Cas. 69; Town of Searey v. Yarnell, 47

sons" might "associate themselves together and become incorporated for the transaction of any lawful business," it was held that it did not mean that a person could form a corporation consisting of himself only, but that he must have at least one associate.[155]

§ 47. Purposes for which corporations may be formed—(a) In general.—A corporation can be organized under general laws only when it is for a purpose which is authorized by the statute, and which is not contrary to law.

As was stated in a previous section, the legislature may create a corporation for any purpose whatsoever, provided it violates no provision of the state or federal constitution.[156] It may therefore, subject to constitutional restrictions, authorize the formation of a corporation for any lawful purpose whatsoever under general laws.[157] Such laws, however, are not generally so broad as to authorize incorporation for any purpose for which persons may wish to incorporate; but they allow incorporation for specified purposes only, and no corporation can be formed under them for any other purpose.[158]

Ark. 269; State v. Critchett, 37 Minn. 13; People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 1 Smith's Cas. 74; In re Germania Sangerbund, 12 Pa. Co. Ct. R. 89. See, also, People v. Golden Gate Lodge (Cal.) 60 Pac. 865.

When an act requires a certain number of persons to organize as a corporation, but there is no provision requiring the presence of any particular number at the first meeting for the purpose of organizing, it is sufficient if the required number sign the application or articles for the organization of the corporation, although all are not present at the first meeting. Packard v. Old Colony R. Co., 168 Mass. 92.

[155] Louisville Banking Co. v. Eisenman, 94 Ky. 83, 42 Am. St. Rep. 335. And see to the same effect, Swift v. Smith, 65 Md. 428, 57 Am. Rep. 336.

[156] See ante, §§ 38, 39.

[157] See Cahill v. Citizens' Mut. Bldg. Ass'n, 61 Ala. 232; Market St. Ry. Co. v. Hellman, 109 Cal. 571; Brown v. Corbin, 40 Minn. 508; State v. Corkins, 123 Mo. 56; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834. And see particular decisions in the notes following.

[158] People v. Gunn, 96 N. Y. 317; Ancient City Sportsman's Club v. Miller, 7 Lans. (N. Y.) 412; Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287; Schuetzen Bund v. Agitations Verein, 44 Mich. 313, 38 Am. Rep. 270; Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552; State v. International Inv. Co., 88 Wis. 512, 43 Am. St. Rep. 920; Meader Furniture Co. v. Rowland, 6 Ohio Dec. 595; In re Homestead Bldg. Co., 10 Phila. (Pa.) 106. And see the other cases cited in the notes following.

(b) Construction of particular statutes—(1) In general.—For example, under a statute authorizing the incorporation of "benevolent, charitable, scientific, and missionary societies," it has been held that a medical college could not be incorporated;[159] and under a statute authorizing corporations for "social, gymnastic, aesthetic, musical, yachting, hunting, fishing, boating, or lawful sporting purposes," it has been held that a corporation could not be organized for the purpose of detecting violations of the game laws, and instituting actions to recover the penalties therefor.[160] A rifle club cannot be organized under a statute authorizing corporations for "scientific" purposes, for rifle shooting, though it may be an art, is not a science.[161]

Various other decisions as to the purposes for which corporations may be organized under particular statutes are given in the note below,[162] and under the subdivisions following.

[159] People v. Gunn, 96 N. Y. 317.

[160] Ancient City Sportsman's Club v. Miller, 7 Lans. (N. Y.) 412.

[161] Vredenburg v. Beham, 33 La. Ann. 627.

[162] Under a statute authorizing corporations for any lawful enterprise, a corporation may be organized to purchase, hold, and convey land. Cahill v. Citizens' Mut. Bldg. Ass'n, 61 Ala. 232.

Under a statute authorizing the formation of private corporations for any purpose for which individuals may lawfully associate themselves, a corporation may be formed for the purpose of "buying and selling, and dealing in all kinds of public and private stocks," with the power to purchase stock in other corporations. Market St. Ry. Co. v. Hellman, 109 Cal. 571.

A statute authorizing corporations for any lawful purpose authorizes a corporation for the purchase of land and construction of houses thereon, and the allotment of the lots and houses among the stockholders in satisfaction of their stock, although the corporation may not comply with the law governing building and loan associations. York Park Bldg. Ass'n v. Barnes, 39 Neb. 834.

A statute authorizing corporations for mutual profit or benefit, not inconsistent with the constitution and laws of the state, authorizes a corporation for the purpose of protecting the property of its members from violence and theft, to raise money for necessary expenses by assessments, and to confer with the state officers, and employ counsel, police, and detectives, when necessary for the prosecution of criminals. Guadalupe & S. A. R. S. Ass'n v. West, 70 Tex. 391.

Such a statute also authorizes a corporation for the purpose of "buying, selling, and dealing in real estate, live stock, bonds, securities, and other properties of all kinds, on its own account and for commission." National Bank of Jefferson v. Texas Inv. Co., 74 Tex. 421.

A statute authorizing corporations for "any lawful enterprise, business pursuit, or occupation" is not restricted to corporations for making money, but authorizes a corporation for any object, consistent with the interests of society, that may engage the attention of men and invite co-operation. It therefore authorizes a

—(2) **Manufacturing corporations.**—A statute authorizing the formation of manufacturing corporations will authorize a corporation for any business which properly falls within the definition of "manufacture," but will not authorize a corporation whose business consists in the mere appropriation and sale of an article furnished by nature, without changing its form, qualities, properties, or combinations by hand labor or machinery. Nor will it authorize a corporation for the mere purchase and sale of goods, without changing their form, qualities, or properties, etc.[163]

It has been held, therefore, expressly, or in effect by the construction of other statutes referring to "manufacturing" corpo-

corporation for the purpose of guarantying the bonds of an educational institution, to strengthen its credit. Maxwell v. Akin, 89 178.

A statute authorizing a corporation for any lawful purpose intended for pecuniary profit or gain authorizes a corporation for the purpose of issuing bonds to be paid for by purchasers thereof in monthly installments, and to be redeemed as may be prescribed, and of selling and disposing of such bonds in the state. State v. Corkins, 123 Mo. 56.

A statute authorizing corporations for "any kind of mining business" does not restrict a corporation formed under it to a single kind of mining business, but authorizes a corporation for several kinds of mining,—as for mining gold, silver, and lead. People v. Beach, 57 How. Pr. (N. Y.) 337.

Holders of lands devised to them in trust for certain purposes may organize a corporation for the execution of the trust under a statute authorizing tenants in common to incorporate for the purpose of managing the property. Howard v. Hayward, 10 Metc. (Mass.) 408.

A statute authorizing a corporation "for the erection" of buildings does not authorize a corporation to improve, extend, and profitably manage a building already erected. People v. Troy House Co., 44 Barb. (N. Y.) 625.

A corporation for the purpose of dealing in real estate and carrying on any kind of real-estate business cannot be formed under a statute authorizing corporations for improvement of real property. Vercontere v. Golden State Land Co., 116 Cal. 410.

A marriage association, the purpose of which is to issue certificates of membership in certain amounts, and to pay parties for whose benefit the certificates are issued from a fund to be raised, in each case of marriage, by an assessment of the members, is not a beneficial or protective association, the amounts being payable without regard to the wants or necessities of the members. In re Mutual Aid Ass'n, 15 Phila. (Pa.) 625.

Under a statute authorizing the formation of corporations for any lawful business, enterprise, pursuits, or occupation, a corporation may be formed "to act as the general or special agent, or attorney in fact, for any public or private corporation, or person, in the management and control of real estate or other property, its purchase, sale, or conveyance, etc." Killingsworth v. Portland Trust Co., 18 Or. 351, 17 Am. St. Rep. 737. See post, § 189.

[163] See ante, § 36(e).

rations, that a statute authorizing the formation of such corporations does not authorize a corporation for liberating natural gas or oil from the earth, and transporting it to consumers;[164] a corporation for mining and selling coal or ore;[165] a corporation for taking water from a natural source and distributing it through ditches or pipes;[166] a corporation for collecting, storing, and selling ice formed by natural causes;[167] a corporation for publishing a daily newspaper, although it may incidentally carry on a jobbing, printing, and publishing business;[168] a corporation for constructing and providing docks for building, raising, and repairing vessels and steamers;[169] a corporation for constructing and repairing vessels;[170] a corporation for purchasing sheep and lambs, slaughtering them, pulling the wool from the hides, converting the offal into fertilizer, reducing the carcasses to a temperature which will retard decomposition, and shipping them to places for delivery to consumers;[171] or a corporation for the purchase and sale of spices, baking powder, tea, and coffee, not manufactured by it, but purchased in bulk, although it may put up the spices and baking powder in packages for sale, may mix different kinds of tea together, put them up in packages, and sell them as "combination tea," and may purchase the coffee raw, and roast and grind it.[172]

On the other hand, such a statute will authorize the forma-

[164] Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105, 117.

[165] Byers v. Franklin Coal Co., 106 Mass. 131. See, also, People v. Horn Silver Min. Co., 105 N. Y. 76.

[166] Dudley v. Jamaica Pond Aqueduct Corp., 100 Mass. 183.

[167] People v. Knickerbocker Ice Co., 99 N. Y. 181. Contra, Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287.

[168] Evening Journal Ass'n v. State Board of Assessors, 47 N. J. Law, 36, 54 Am. Rep. 114. Compare In re Kenyon, 1 Utah, 47.

This is clearly true of a corporation which merely publishes a newspaper, having the type set and the paper printed by another under contract. People v. Roberts, 19 App. Div. (N. Y.) 632, 155 N. Y. 1. See ante, § 36(e).

[169] People v. New York Floating Dry Dock Co., 63 How. Pr. (N. Y.) 451, 92 N. Y. 487.

[170] People v. New York Floating Dry Dock Co., 63 How. Pr. (N. Y.) 451, 92 N. Y. 487.

[171] People v. Roberts, 155 N. Y. 408, reversing 20 App. Div. 521. But see Engle v. Sohn, 41 Ohio St. 691, 52 Am. Rep. 103, where it was held that a pork-packer was a manufacturer. See ante, § 36(e), note 102.

[172] People v. Roberts, 145 N. Y. 375.

tion of a corporation for the purpose of making and selling lumber, flour, and meal;[173] a corporation for making illuminating gas or electricity, and furnishing it to consumers for lighting, heating, or power;[174] a corporation for making ice by artificial means;[175] a corporation "to conduct and prosecute the business of book printing and job printing, engraving, electrotyping, and lithographing," whose capital is invested in that business, and which executes only on orders;[176] a corporation for the business of "publishing books and of printing and book binding;"[177] a corporation for manufacturing all kinds of lumber, and the sale of the same, and the purchasing and selling of mills, lands, standing timber, logs, and lumber, for the purpose of such business;[178] and a corporation for refining and preparing for use oil, coal, and other minerals.[179]

A statute authorizing the creation of manufacturing corporations would not authorize a corporation for the purpose of buying, selling, shipping, and storing of grain, building materials, cattle, and various other articles, although it may, as an insignificant part of its business, manufacture flour and feed.[180]

——**(3) Corporations for trade and commerce.**—A statute authorizing corporations for "trade and commerce" authorizes corporations for the lawful buying and selling of any articles which are the subject of trade and commerce. It authorizes a corporation for buying and selling stocks, bonds, and public securities.[181] And it has been held that ice companies, gas companies, and water companies, intended to supply a city and its inhabitants respectively with ice, gas, and water, are within a

[173] Cross v. Pickneyville Mill Co., 17 Ill. 54.

[174] Nassua Gas Light Co. v. City of Brooklyn, 89 N. Y. 409; Com. v. Allegheny Gas Co., 1 Dauph. Co. Rep. (Pa.) 93. See ante, § 36(e), note 105.

[175] See Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105, 117.

[176] Evening Journal Ass'n v. State Board of Assessors, 47 N. J. Law, 36, 54 Am. Rep. 114. See, also, In re Kenyon, 1 Utah, 47.

[177] Com. v. J. B. Lippincott Co., 156 Pa. St. 543; Com. v. Wm. Wann Co., 150 Pa. St. 64.

[178] Wagner v. Corcoran, 2 Pa. Dist. R. 440.

[179] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

[180] Mohr v. Minnesota Elevator Co., 40 Minn. 343.

[181] In re Pittsburgh Stock Exchange, 26 Pittsb. Leg. J. (N. S.; Pa.) 308. See, also, Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552.

statute authorizing corporations for manufacturing, etc., purposes, "or for the purpose of engaging in any species of trade or commerce."[182] Other decisions are given in the note below.[183]

——**(4) Corporations for industrial pursuits.**—A statute[184] authorizing the creation of corporations for the prosecution of "industrial pursuits" authorizes a corporation for carrying on the express business,[185] or for carrying on a mercantile business by selling goods.[186]

——**(5) Corporations for work of public utility.**—A statute authorizing corporations for a "work of public utility" authorizes a corporation for establishing and maintaining a wharf boat and steam elevator, and carrying on a general storage and forwarding business.[187]

——**(6) Benevolent and charitable corporations.**—Under a stat-

[182] People v. Blake, 19 Cal. 579.

[183] A statute authorizing corporations for the purpose "of trade, or of carrying on any lawful mechanical, manufacturing, or agricultural business," authorizes a corporation for the purpose of "buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the constructing and leasing of a building." Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552.

It has been lately held that a corporation for buying and selling bonds is not authorized by a statute providing for the organization of corporations for the purpose of buying and selling merchandise and conducting mercantile operations. Indiana Bond Co. v. Ogle, 22 Ind. App. 593.

A statute authorizing corporations for manufacturing, or mining, or for "engaging in any other species of trade, business, or commerce," authorizes a corporation for the "purchase of swamp and overflowed lands and adjacent high lands, * * * the construction of dykes, levees, canals, reservoirs, and other works." People v. Hagar, 52 Cal. 171.

For other cases as to what are trading or mercantile corporations, see ante, § 36(c), (d).

[184] Rev. St. U. S. § 1889, allowing the territories of the United States to create, by general laws, corporations for mining, manufacturing, or other industrial pursuits.

In Carver Mercantile Co. v. Hulme, 7 Mont. 566, it was held that the Montana law of 1872, providing for the formation of corporations for carrying on any branch of business "designed to aid in the industrial or productive interests of the country, and the development thereof," was not in conflict with the section of the United States Revised Statutes above cited, and that a mercantile corporation might be incorporated under such law.

[185] Wells, Fargo & Co. v. Northern Pac. Ry. Co., 23 Fed. 469.

[186] Bashford-Burmister Co. v. Agua Fria Copper Co. (Ariz.) 35 Pac. 983; Carver Mercantile Co. v. Hulme, 7 Mont. 566.

[187] Glen v. Breard, 35 La. Ann. 875. See, also, ante, § 36(s).

ute authorizing the incorporation of "benevolent, charitable, scientific, and missionary societies," no corporation can be formed unless it is for one or more of the purposes mentioned. A corporation for business purposes, having in view the pecuniary profit of its members, does not come within the statute, although it may incidentally contemplate the promotion of the interests of others; and therefore it has been held that such a statute does not authorize a corporation for the purpose of providing a "relief fund," and to "aid persons of moderate pecuniary resources in obtaining from a reputable insurance company insurance on their lives, and in maintaining the necessary payments on the same; and to secure to families or persons so insured an immediate advance of funds in case of death."[188]

An association whose purpose is to endow the wife of each member with a sum of money equal to as many dollars as there are members, the money to be raised by assessment upon the members, is not within a statute authorizing the incorporation of benevolent societies, for there is no intention to bestow any benefit or help without what is thought to be an equivalent.[189]

——**(7) General words following specific words.**—In some states, the statutes, after authorizing corporations to be formed for certain enumerated purposes, contain the general words, "or for any other lawful business or purpose," or words to the same effect. In construing such statutes, some courts have applied the familiar rule of statutory construction that, when specific words are followed by general words, the latter are to be construed as applying only to things of the same general kind as those specified, and have held that where a statute allows corporations to be formed for certain specified purposes, or for any "other" lawful business or purpose, etc., the general words refer to such purposes only as are of the same general character as those specified. Thus, in Wisconsin, it was held that a statute authoriz-

[188] People v. Nelson, 46 N. Y. 477, 60 Barb. 159, 3 Lans. 394. See, also, as to what are not benevolent or charitable associations, Sheren v. Mendenhall, 23 Minn. 92; Newcomb v. Boston Protective Department, 151 Mass. 215; In re St. Louis Institute of Christian Science, 27 Mo. App. 633; State v. McGrath, 95 Mo. 193. And see ante, § 36(q).

[189] State v. Critchett, 37 Minn. 13. See, also, Foster v. Moulton, 35 Minn. 458.

ing corporations for certain enumerated purposes, "or for any lawful business or purpose whatever," with certain exceptions, authorized corporations for such purposes only as were of the same general kind as the purposes specified.[190]

Other courts, in view of the fact that the *ejusdem generis* rule of statutory construction is only an aid in ascertaining the legislative intent, and must yield if a contrary intention otherwise appears, have held that general words in such statutes were not restricted by specific words preceding them, and should be given their ordinary meaning. According to this view, a Minnesota statute which authorized the formation of corporations for certain specified purposes, or "other lawful business," was construed as authorizing the formation of corporations for carrying on any kind of lawful business for pecuniary profit, not elsewhere specially provided for, though not of the same character as the corporations previously enumerated.[191] And it was held in a federal court that a statute authorizing corporations for "mining, manufacturing, and other industrial pursuits" did not mean industrial pursuits of the same kind as mining and manufacturing, but extended to and included the express business.[192]

In Texas, where a statute authorized corporations for certain specified purposes, or "for any purpose intended for mutual profit or benefit, not otherwise specially provided for and not inconsistent with the constitution and laws of the state," it was held that a corporation might be organized for the purpose "of buying, selling, and dealing in real estate, live stock, bonds, securities, and other properties of all kinds, on its own account and for commission in the United States and elsewhere."[193]

[190] State v. International Inv. Co., 88 Wis. 512, 43 Am. St. Rep. 920. See, also, Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557. Since the statute in terms authorized the formation of telegraph companies, it was held that the general words included telephone companies. Wisconsin Telephone Co. v. City of Oshkosh, 62 Wis. 32.

[191] Brown v. Corbin, 40 Minn. 508. See, also, State v. Corkins, 123 Mo. 56; State v. Minnesota Thresher Mfg. Co., 40 Minn. 213; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834.

[192] Wells, Fargo & Co. v. Northern Pac. Ry. Co., 23 Fed. 469.

[193] National Bank of Jefferson v. Texas Inv. Co., 74 Tex. 421. See, also, Guadalupe & S. A. R. S. Ass'n v. West, 70 Tex. 391. Compare,

(c) Unlawful or injurious purposes.—In Pennsylvania it is expressly provided by statute that the purpose for which a corporation is formed shall not be unlawful or injurious to the community, and under this statute it has been held that an application for a charter of incorporation should be denied, if the purpose of the proposed corporation is uncertain or doubtful, or if it may be perverted to improper or unworthy purposes, injurious to morals or to the public welfare.[194]

In most of the other states, perhaps in all, statutes expressly require that the purpose for which corporations are formed shall be lawful, or that they shall not be "inconsistent with the constitution and laws of the state." Indeed, this would be implied in the absence of any express provision, and it may therefore be laid down as the rule in all the states, that a corporation cannot be organized for a purpose which renders it contrary to the common or statute law of the state, or contrary to public policy.[195]

——**Particular decisions.**—In accordance with this principle, it was held in a Michigan case that liquor dealers could not lawfully organize a corporation for the purpose of defending prosecutions for violations of the laws prohibiting and punishing the sale of intoxicating liquors, or otherwise opposing such laws.[196] And in a Pennsylvania case the court denied an application by a benevolent society for a charter of incorporation, on the ground that the charter applied for was contrary to public policy in providing that members of the society who should enlist in the

however, Texas & M. R. Canal & Nav. Co. v. Galveston County Court, 45 Tex. 272.

[194] In re Chinese Club, 1 Pa. Dist. R. 84.

[195] Schutzen Bund v. Agitations Verein, 44 Mich. 313, 38 Am. Rep. 270; In re Mulholland Ben. Soc., 10 Phila. (Pa.) 19; In re Mutual Aid Ass'n, 15 Phila. (Pa.) 625; In re Helping Hand Marriage Ass'n, 15 Phila. (Pa.) 644; McGrew v. City Produce Exchange, 85 Tenn. 572, 4 Am. St. Rep. 771; Chicora Co. v. Crews, 6 Rich. (S. C.) 243; Empire Mills v. Alston Grocery Co., 4 Willson, Civ. Cas. Ct. App. (Tex.) § 221; and other cases cited in the notes following.

A corporation cannot be organized ostensibly to deal in grain, but with the real object of speculating by gambling in futures. McGrew v. City Produce Exchange, 85 Tenn. 572, 4 Am. St. Rep. 771.

[196] Schutzen Bund v. Agitations Verein, 44 Mich. 313, 38 Am. Rep. 270.

army or navy should forfeit their membership and all claims on the society.[197]

It has been held in a number of cases that a corporation is contrary to public policy, and therefore illegal, where its purpose is to *unduly* prevent competition and create a monopoly.[198] Under an Illinois statute, for example, providing for the organization of corporations for "any lawful purpose," it was held that a corporation could not be formed "to purchase and hold or sell the capital stock of any gas or electric company or companies in Chicago or elsewhere in Illinois," as the object of such a corporation clearly tended to prevent competition and create a monopoly.[199]

Of course, a corporation cannot be invalid, as contrary to public policy, because of its object, if the acts contemplated are authorized by the laws of the state, although they would be unlawful if not authorized. Thus, where the laws of a state permit the consolidation of corporations, it is not contrary to public policy to organize a corporation with the ulterior purpose of consolidating with another corporation, although consolidation would be illegal if not authorized.[200]

[197] In re Mulholland Ben. Soc., 10 Phila. (Pa.) 19.

[198] People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200; Richardson v. Buhl, 77 Mich. 632; State v. Nebraska Distilling Co., 29 Neb. 700; Clancey v. Onondaga Salt Mfg. Co., 62 Barb. (N. Y.) 395.

[199] People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319.

It was held, however, in Sayre v. Louisville Union Ben. Ass'n, 1 Duv. (Ky.) 143, 85 Am. Dec. 613, that common carriers may form a corporation for the purpose of protecting themselves against undue competition.

And in United States Vinegar Co. v. Schlegel, 67 Hun (N. Y.) 356, it was held that an unlawful purpose did not appear from the charter of a corporation authorizing it to "buy, sell, deal in and handle vinegar," or its prospectus, which stated its purpose to be to buy and sell vinegar with a view to regulating the production, lessening the cost of selling, equalizing the distribution of the surplus in accordance with the demands of the various sections of the country, and thereby limiting the cost of reaching the consumer, and benefitting both the producer and consumer. And see United States Vinegar Co. v. Spainer, 67 Hun (N. Y.) 652.

For a case in which it was held that whether a corporation was organized for an unlawful purpose (restraint of competition) was a question for the jury, in an action by the people to dissolve it, see People v. Milk Exchange, 77 Hun (N. Y.) 436.

[200] Hill v. Nisbet, 100 Ind. 341.

(d) Attempt to incorporate under one statute, when another is applicable.—It has been held that an association which has attempted to incorporate under a particular statute, for purposes which are not authorized by such statute, may be sustained as a valid corporation under another statute, under which incorporation for such purposes was authorized. Thus, in a Minnesota case, a corporation formed, as stated in its articles of association, to carry on a manufacturing or mechanical business, and also to purchase the stock and evidences of indebtedness of an insolvent corporation, was held to be a valid corporation under a statute authorizing the formation of corporations for the purpose of carrying on any lawful business, although the articles recited that it was formed under a different statute, under which no corporation could be organized except for an exclusively manufacturing or mechanical business.[201] Of course this can only apply where all the mandatory provisions of the statute under which it is sought to sustain the corporation have been complied with.[202]

§ 48. Organization of corporations—(a) In general. In organizing a corporation, whether under a general or a special act, there must, to create a corporation de jure, as distinguished from a corporation de facto, be at least a substantial compliance with all conditions precedent prescribed by the act.

The statutes, general and special, authorizing the formation of a corporation almost invariably require that certain formalities shall be observed in the organization of the corporation.[202a] Noncompliance with such requirements will not necessarily prevent the creation of a corporation *de facto,* or a corporation which is valid as against every person but the state, but an organization in substantial compliance with all mandatory provisions is essential to the creation of a corporation *de jure.* In other sections, we shall consider at some length the effect of failure to comply with the provisions of the statute in the organization of a corporation, and explain the distinction between *de*

[201] State v. Minnesota Thresher Mfg. Co., 40 Minn. 213.

[202] See post, §§ 67, 76, 82(f).

[202a] As to proof of organization and presumption of regularity, see post, §§ 63, 67(f).

facto and *de jure* corporations.[203] In this section we shall endeavor to show in a general way what is necessary in the organization of a corporation, and what constitutes a substantial compliance with particular statutory provisions.

(b) **Place of organization.**—Since, as we shall presently see, a corporation can do no act outside of the state by or under whose laws it is created, except such acts as it may do through its agents,[204] it has been held that the formal organization of a corporation in another state is ineffectual, as this is a corporate act which cannot be done through mere agents.[205] It has been

[203] Post, § 70 et seq.

[204] Post, § 131.

[205] Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619; Freeman v. Machias Water Power & Mill Co., 38 Me. 343; Smith v. Silver Valley Min. Co., 64 Md. 85, 54 Am. Rep. 760, 1 Keener's Cas. 71; Tuckasegee Min. Co. v. Goodhue, 118 N. C. 981; Camp v. Byrne, 41 Mo. 525. But see Heath v. Silverthorn Lead Mining & Smelting Co., 39 Wis. 146.

Speaking of corporations aggregate, it was said by Judge Shepley in a Maine case: "It is often stated in the books, that such a corporation is created by its charter. This is not precisely correct. The charter only confers the power of life, or the right to come into existence, and provides the instruments by which it may become an artificial being, or acting entity. Such a corporation has been well defined to be an artificial being, invisible, intangible, and existing only in contemplation of law. The instruments provided to bring the artificial being into life and active operation, are the persons named in the charter, and those who by virtue of its provisions, may become associated with them. Those persons or corporators, as natural persons, have no such power. The charter confers upon them a new faculty for this purpose. A faculty which they can have only by virtue of the law, which confers it. That law is inoperative beyond the bounds of the legislative power, by which it is enacted. As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty, which confers it; and they cannot possess or exercise it there, can have no more power there to make the artificial being act, than other persons not named or associated as corporators, any attempt to exercise such a faculty there, is merely an usurpation of authority by persons destitute of it, and acting without any legal capacity to act in that manner. It follows that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are absolutely void." Miller v. Ewer, 27 Me. 509, 518, 46 Am. Dec. 619.

A corporation, however, may enter into contracts and do other acts in another state through agents. See post, § 131.

Where a charter granted by the legislature of Illinois declared certain persons to be a corporation, and named the directors, thereby creating the corporation, it was held in a Missouri case that the directors could meet and act in Missouri in organizing the corporation, as the directors of a corporation are its agents, and not the corporation itself. Ohio & Mississippi R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128.

held, however, that where the directors of a corporation meet and organize outside of the state, and afterwards the corporators, acting within the state, elect directors, issue stock, and otherwise exercise corporate powers, there is a sufficient organization, within the state.[206]

And in North Carolina it has been held that, while it is true that a corporation created by the laws of that state cannot be lawfully organized in another state, yet neither the corporation nor its debtors, nor any one dealing with it as a lawful corporation, will be permitted to deny its existence as a corporation, upon the ground that it was organized in another state.[207]

(c) **Time of organization.**—In order that an association organized as a corporation under a general law may be a corporation *de jure,* it must have been organized within the time, if any, prescribed by the statute; but failure to organize within such time will not prevent it from being a corporation *de facto.*[208]

(d) **Application for charter.**—In some states, in forming a corporation under general laws, the first step is to make a formal application for incorporation to some officer or court. The form of the application or petition, and its contents, as well as the person to whom it is to be addressed, are generally prescribed and fixed by the statutes, which, of course, vary in the different states; and the statutes must be substantially complied with, or a charter or certificate will not be granted.[209] In some states, at least a certain number of persons must join in the application,[210] but in others no particular number is required.

[206] Glymont Improvement & Excursion Co. v. Toler, 80 Md. 278.

[207] Tuckasegee Min. Co. v. Goodhue, 118 N. C. 981. And see Ohio & Mississippi R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128.

[208] Lehman v. Warner, 61 Ala. 455; St. Louis, Alton & T. H. R. Co. v. Belleville City Ry. Co., 158 Ill. 390; County of Macon v. Shores, 97 U. S. 272, 277.

As to the presumption in this respect, see post, § 67(f), note 417.

[209] See In re Deveaux, 54 Ga. 637; Van Pelt v. Home Bldg. & Loan Ass'n, 79 Ga. 439; In re National Literary Ass'n, 30 Pa. St. 150.

[210] Workingmen's Bldg. & Loan Ass'n v. Coleman, 89 Pa. St. 428.

If the number of persons required by a statute for the organization of a corporation sign the application or articles, they need not all attend the first meeting, unless the statute so requires. Packard v. Old Colony R. Co., 168 Mass. 92.

The application must be addressed, according to the requirement of the particular statute, to the state, or to some officer of the state, generally the secretary of state, or to some court or judge. The application need not be made by an existing association,[211] unless it is so required by the statute.[212]

(e) Notice and publication.—Generally the statutes require, as a condition precedent to incorporation, that notice of the application for incorporation shall be given, either by publishing for a certain length of time the proposed charter, or a memorandum stating the objects of the proposed corporation, or in some other way prescribed by the statute, and such requirement must be at least substantially complied with.[213]

(f) Subscriptions to stock and payment thereof.—Under some statutes it is not necessary that the capital stock of a corporation shall be paid, or even subscribed, before the corporation is organized;[214] under others, all or a part of the stock must be subscribed before a corporation can be organized;[215] and under some, all or part must be actually paid in.[216]

(g) Articles, memorandum, or certificate of association—(1) In general.—In most states, the persons forming a corporation under the general laws are required to prepare and sign a memorandum or articles of association.[217] In some states they must

[211] Roman Catholic Orphan Asylum v. Abrams, 49 Cal. 455.

[212] It has been held that this is impliedly required in Pennsylvania, because the statute requires that the certificate of incorporation shall give the names and residences of the directors chosen for the first year. See In re Red Men's Mut. Relief Ass'n, 10 Phila. (Pa.) 546.

[213] See Heinig v. Adams & Westlake Mfg. Co., 81 Ky. 300, 5 Ky. Law Rep. 317; Eisfield v. Kenworth, 50 Iowa, 389; Clegg v. Hamilton & Wright County Grange Co., 61 Iowa, 121; Unity Ins. Co. v. Cram, 43 N. H. 636; Thornton v. Balcom, 85 Iowa, 198; In re Church of the Holy Communion, 14 Phila. (Pa.) 121, 8 Wkly. Notes Cas. 357.

[214] Hammond v. Straus, 53 Md. 1; Perkins v. Sanders, 56 Miss. 733; Proprietors of City Hotel v. Dickinson, 6 Gray (Mass.) 586.

[215] Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 246; Livesey v. Omaha Hotel Co., 5 Neb. 50; Leighty v. Susquehanna & W. Turnpike Co., 14 Serg. & R. (Pa.) 434; Boyd v. Peach Bottom Ry. Co., 90 Pa. St. 169; People v. Chambers, 42 Cal. 201; Lake Ontario, Auburn & N. Y. R. Co. v. Mason, 16 N. Y. 451.

[216] People v. Chambers, 42 Cal. 201.

[217] Utley v. Union Tool Co., 11 Gray (Mass.) 139, 1 Cum. Cas. 967; Corey v. Morrill, 61 Vt. 598; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977; State v. Critchett, 37 Minn. 13;

also acknowledge the same before some officer or court.[218] Substantial compliance with these provisions is essential.[219] In subscribing articles of association, initials may be used for the Christian name.[220]

The articles of association of a corporation may be written on separate sheets, each of which, being a copy of the others, is signed by only a portion of the incorporators.[221] Seals must follow the names of the corporators, when required by the statute.[222]

——**(2) Contents of memorandum or articles.**—The statutes which require articles of association generally prescribe their necessary contents, and a substantial compliance with the requirements of the statute in this respect is essential to a valid incorporation.[223]

——**(3) Statement of name and object or purpose.**—Thus, the statutes very generally require that the articles of association or

Unity Ins. Co. v. Cram, 43 N. H. 636.

The number required by the statute must sign the articles. See Workingmen's Bldg. & Loan Ass'n v. Coleman, 89 Pa. St. 428; People v. Golden Gate Lodge (Cal.) 60 Pac. 865. And see ante, § 46.

218 Boyce v. Towsontown Station of M. E. Church, 46 Md. 359, 1 Smith's Cas. 146 (see post, § 87(e)-(1), note 286); Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977; Indianapolis Furnace & Min. Co. v. Herkimer, 46 Ind. 142, 1 Smith's Cas. 97; People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 1 Smith's Cas. 74; People v. Cheeseman, 7 Colo. 376; Doyle v. Mizner, 42 Mich. 332; Johnston v. Ewing Female University, 35 Ill. 518; Hughes v. Antietam Mfg. Co., 34 Md. 316; State v. Lee, 21 Ohio St. 662; Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738.

219 See the cases above cited.

A statute requiring corporators to sign the articles of incorporation does not require that each shall be able to sign his name; and a mark is sufficient. Trustees of Seventh Street Colored M. E. Church v. Campbell, 48 La. Ann. 1543.

220 State v. Beck, 81 Ind. 500.

221 Lake Ontario, Auburn & N. Y. R. Co. v. Mason, 16 N. Y. 451.

222 Griffin v. Clinton Line Extension R. Co., 1 West. Law M. 31, Fed. Cas. No. 5,816.

In an Ohio case it was held that where the certificate of persons organizing a corporation was defective in not being sealed as required by statute, the defect was such as might be remedied under a statute providing that it should be competent for the courts to give full effect to defective instruments in accordance with the intention of the parties. Warren v. Callender, 20 Ohio St. 190.

223 Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287; Van Pelt v. Home Bldg. & Loan Ass'n, 79 Ga. 439; Wert v. Crawfordsville & A. Turnpike Co., 19 Ind. 242; In re Crown Bank, 44 Ch. Div. 634; and other cases cited in the notes following.

application shall state the name and the purpose or objects of the proposed corporation, and a substantial compliance with this requirement is a condition precedent to the existence of the corporation.[224] A statement that the object of the corporation is to carry on any business which it may deem profitable is not sufficient.[225] No other powers, privileges, or immunities, than those prescribed by the legislature can be conferred upon a corporation by including them in the articles of association.[226] But the fact that the articles of association contain unauthorized provisions, in addition to those that are authorized, does not render the organization of the corporation void, for they may be rejected as surplusage.[227]

——**Place of business.**—It is also necessary that there shall be at least a substantial compliance with a provision that the application, memorandum, or articles of association shall give the name and the location of the principal place of business of the proposed corporation.[228]

[224] In re Crown Bank, 44 Ch. Div. 634; Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287; In re McKees Rocks Volunteer Firemen's Relief Ass'n, 6 Pa. Dist. R. 477; Bane v. Calvert College Educational Soc., 47 Md. 117; People v. Beach, 19 Hun (N. Y.) 259; Van Pelt v. Home Bldg. & Loan Ass'n, 79 Ga. 439; Piper v. Rhodes, 30 Ind. 309; Rhodes v. Piper, 40 Ind. 369; West v. Bulliskin Prairie Ditching Co., 32 Ind. 138; O'Riley v. Kankakee Valley Draining Co., 32 Ind. 169; Seyberger v. Calumet Draining Co., 33 Ind. 330; Crawford v. Prairie Creek Ditching Ass'n, 44 Ind. 361.

The articles of incorporation of a manufacturing corporation need not state the particular kind of manufacturing in which it is proposed to engage, unless it is required by statute. Hughes v. Antietam Mfg. Co., 34 Md. 316.

Where, in preparing a certificate of incorporation, the corporators employ only the words used in the statute to describe the general purposes of such incorporation, it will be presumed that they intended to create a corporation of the same general powers granted by the statute, rather than that by such words they sought to apply special limitations upon the powers of the corporation. Whetstone v. Ottawa University, 13 Kan. 320.

[225] In re Crown Bank, 44 Ch. Div. 634.

[226] Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546; In re Medical College of Philadelphia, 3 Whart. (Pa.) 445.

The incorporation of a lumber and sawmill company is not void, as attempting to create a railroad company, because its articles state that it is formed to deal in railroads and tramways, where it appears that such statement refers merely to such railroads and tramways as may be necessary to its plant. People v. Mt. Shasto Mfg. Co., 107 Cal. 256.

[227] Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546. See post, § 76.

[228] Montgomery v. Forbes, 148

——**Directors.**—The statutes sometimes require that the number of the directors of the proposed corporation, or the number and the names and residences of the directors for the first year, shall be stated in the memorandum or articles of association, and this is essential.[229] The directors need not be shareholders or subscribers to the stock of the corporation, unless this is expressly required by the statute.[230]

A certificate of incorporation which provides that the corporate affairs shall be controlled by its president, vice president, and attorney, instead of providing for a board of directors or trustees, as required by the statute, is insufficient to create a corporation *de jure*.[231]

——**Capital stock and subscriptions.**—It is also frequently provided that, in the case of joint-stock corporations, the application, articles of association, or certificate shall show the amount of the capital stock of the proposed corporation, or the amount actually paid in, and the number of shares into which it is divided, and that it shall give the names and residences of the shareholders, and the amount of stock for which each has subscribed, and statements in substantial compliance with such requirements are essential to a valid incorporation.[232]

Mass. 249, 1 Smith's Cas. 94, 2 Keener's Cas. 1,945, 1 Cum. Cas. 69; Haris v. McGregor, 29 Cal, 124; In re Spring Valley Water Works, 17 Cal. 132; People v. Beach, 19 Hun (N. Y.) 259; In re Enterprise Mut. Beneficial Ass'n, 10 Phila. (Pa.) 380.

[229] Reed v. Richmond St. R. Co., 50 Ind. 342; In re Saint Ladislaus S. & B. Ass'n, 19 Pa. Co. Ct. R. 25; People v. Selfridge, 52 Cal. 331, 1 Keener's Cas. 90. And see Bates v. Wilson, 14 Colo. 140.

[230] Densmore Oil Co. v. Densmore, 64 Pa. St. 43; In re British Provident L. & G. Ass'n, 5 Ch. Div. 306.

[231] Bates v. Wilson, 14 Colo. 140.

[232] Hendrix v. Academy of Music, 73 Ga. 437; State v. Bethlehem & Z. Gravel Road Co., 32 Ind. 357; State v. Shelbyville & C. Turnpike Co., 41 Ind. 151; Busenback v. Attica & B. Gravel Road Co., 43 Ind. 265; Williams v. Hewitt, 47 La. Ann. 1076. See, also, Miller v. Wild Cat Gravel Road Co., 52 Ind. 51; Bolling v. Le Grand, 87 Ala. 482; People v. Stockton & Visalia R. Co., 45 Cal. 306, 13 Am. Rep. 178.

A statutory requirement that the articles or certificate of incorporation shall state the time when, and the manner in which, payment on stock subscribed shall be made, is substantially complied with by a statement that the stock shall be paid in cash at such times, in such amounts, and with such notice to subscribers, as the managers and directors shall deem best for all the parties in interest. Baltimore & Ohio Tel. Co. v. Morgan's L. & T. R. & S. S. Co., 37 La. Ann. 883.

The same is true of a statement

——**Manner of carrying on business.**—In Ohio, and perhaps in other states, the certificate of incorporation must show the manner of carrying on the business of the association.[233]

——**Indebtedness.**—In some states, the statue requires the application, articles of association, or certificate to state the maximum amount of indebtedness which is to be incurred by the proposed corporation, and it is expressly provided that the amount shall not exceed a certain proportion of its capital stock.[234] A recital in the articles of association that the total indebtedness of the corporation shall not at any one time exceed a specified amount, except by a majority vote of the stockholders present at a called or annual meeting, is a substantial compliance with such a requirement.[235] And it is sufficient to state that the limit of the corporation's indebtedness shall be a certain percentage of the amount of the capital stock subscribed, as the amount of the stock subscribed is at any time ascertainable.[236]

——**Description of seal.**—When it is required by the statute, the articles of incorporation must contain an impression or description of the corporate seal. A statement in the articles that the corporate seal shall be a circle formed by the letters of the name of the corporation and the name of the state was held a sufficient compliance with such a requirement.[237]

that the stock shall be paid for in cash, and that no certificate shall be issued until such payment is made. New Orleans & Gulf R. Co. v. Frank, 39 La. Ann. 707.

A requirement that the articles of incorporation shall show the number of shares subscribed by each stockholder, and his name and place of residence, is sufficiently complied with where the articles are followed by the words "Names," "Residence," "Shares," under which the subscribers write their names and residence, and the number of shares subscribed. Vawter v. Franklin College, 53 Ind. 88.

The use of ditto marks (") following the name of a subscriber, under the name of a specified place, is sufficient to designate his residence. Steinmetz v. Versailles & O. Turnpike Co., 57 Ind. 457.

[233] Such a requirement is not satisfied by a certificate stating that "the manner of carrying on the business of the association shall be such as it may from time to time prescribe, or which may be prescribed by the rules and regulations and by-laws of the association, not inconsistent with the laws of the state." State v. Central Ohio Mut. Relief Ass'n, 29 Ohio St. 399.

[234] Sweney v. Talcott, 85 Iowa, 103; Thornton v. Balcom, 85 Iowa, 198; Park v. Swart, 82 Iowa, 37.

[235] Thornton v. Balcom, 85 Iowa, 198.

[236] Park v. Swart, 92 Iowa, 37.

[237] Vawter v. Franklin College, 53 Ind. 88.

(h) Issue of certificate of incorporation.—The statutes generally provide for the issuance of a certificate of incorporation by some officer or court on the organization of a corporation, and the certificate is sometimes, though not always, made a condition precedent to corporate existence. The certificate must be obtained when required by the statute, and must be substantially in the form prescribed by the statute.[238]

——Issue of order or certificate by court.—In some jurisdictions, statutes have been enacted authorizing particular courts to make an order conferring corporate powers under prescribed conditions. Such statutes are not unconstitutional as a delegation of legislative power to the court, for the court merely acts in a ministerial capacity under the statute, and the corporations, when organized thereunder, are created, not by the court, but by the legislature.[239] Under such a statute, the court has such authority only as has been conferred upon it by the legislature. It can confer corporate powers for no other purpose than is specified in the statute.[240]

(i) **Revocation of certificate.**—In Illinois it has been held that, after the secretary of state has issued a license or certificate for the organization of a corporation, he has no power to revoke the same, except where the corporators fail to complete their organization as a corporation and proceed to business within the time allowed by statute.[241] But in Pennsylvania, where

[238] For decisions as to the issuance of a certificate, see Stowe v. Flagg, 72 Ill. 397; Richmond Factory Ass'n v. Clarke, 61 Me. 351; Field v. Cooks, 16 La. Ann. 153; Dundee Mortg. & Trust Inv. Co. v. Cooper, 26 Fed. 665; Humphreys v. Mooney, 5 Colo. 282; Roman Catholic Orphan Asylum v. Abrams, 49 Cal. 455; Callendar v. Painesville & Hudson R. Co., 11 Ohio St. 516, 1 Smith's Cas. 144.

In Alabama it has been held that, where a corporation takes all proper steps towards its organization, as required by statute, it is fully incorporated, although the probate judge, although requested, has not issued the certificate of incorporation required by a statute providing that the judge shall certify, "on the completion of their organization," that they are organized under the law, and are authorized to do business. Sparks v. Woodstock Iron & Steel Co., 87 Ala. 294.

[239] Ante, § 42.

[240] Com. v. Conover, 30 Leg. Int. (Pa.) 200. And see In re Cressona Bldg. Ass'n, 1 Leg. Rec. (Pa.) 177; In re Land Co., 1 Del. Co. Rep. (Pa.) 431; In re Medical College of Philadelphia, 3 Whart. (Pa.) 444; In re Solebury Mut. Protective Soc., 2 Del. Co. R. (Pa.) 139, 3 Pa. Co. Ct. R. 637.

[241] Illinois Watch Case Co. v. Pearson, 140 Ill. 423.

the court, under authority of a statute, granted a certificate of incorporation to a company claiming to be a beneficial association, and within a statute authorizing incorporation of such associations, and afterwards learned that the certificate should not have been granted, and revoked the same, it was held that the revocation was proper, as the certificate was improvidently granted, without authority, and was therefore void.[242]

(j) Filing articles or certificate.—It is also generally required that the articles or memorandum of association, or the certificate of organization, shall be filed for record with the secretary of state, or some other officer. In some jurisdictions this is a condition precedent to the legal existence of the corporation.[243] In others it is merely a condition precedent to the right of the corporation to engage in business.[244]

——**A fee for the filing** of the articles or certificate is generally required to be paid to the secretary of state or other officer in whose office they are filed, and the payment of the fee is sometimes, although not always, made a condition precedent to the creation of the corporation.[245]

(k) Mandamus to compel officer to act.—Since an officer or court charged with the duty to determine whether the general incorporation law has been complied with in the organization of a corporation, and, if so, to issue an order or certificate of incorporation, or to permit a certificate to be filed, acts in a ministerial capacity only, *mandamus* will lie to compel them to act,

[242] In re National Indemnity & Endowment Co., 142 Pa. St. 450.

[243] Bigelow v. Gregory, 73 Ill. 197; Loverin v. McLaughlin, 161 Ill. 417; Gade v. Forest Glen Brick & Tile Co., 165 Ill. 367; Martin v. Deetz, 102 Cal. 55; Bergeron v. Hobbs, 96 Wis. 641; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977; Guckert v. Hacke, 159 Pa. St. 303; Borough of Braddock v. Penn Water Co., 189 Pa. St. 379; Childs v. Hurd, 32 W. Va. 66; Garnett v. Richardson, 35 Ark. 144; Hurt v. Salisbury, 55 Mo. 311; Walton v. Riley, 85 Ky. 413; Indianapolis Furnace & Min. Co. v. Herkimer, 46 Ind. 142, 1 Smith's Cas. 97.

[244] In re Shakopee Mfg. Co., 37 Minn. 91; Johns v. People, 25 Mich. 499; Granby Mining & Smelting Co. v. Richards, 95 Mo. 160. See post, §§ 71, 73.

[245] Union Horse Shoe Works v. Lewis, 1 Abb. (U. S.) 518, Fed. Cas. No. 14,365; Combined Saw & Planer Co. v. Flournoy, 88 Va. 1029; Edwards v. Denver & R. G. R. Co., 13 Colo. 59; State v. Rotwitt, 17 Mont. 537; Ashley v. Ryan, 49 Ohio St. 504.

and, in a proper case, to issue or file such order or certificate.[246]

(l) Provisions not applicable to special charters.—Statutory provisions prescribing conditions precedent in the formation of corporations may be limited to corporations organized under general laws, or they may apply also to corporations created by special acts. Whether a particular provision is so limited or not depends, of course, upon the intention of the legislature as shown by the language of the act. It was held that a provision of the Georgia Code that corporations should not act until payment of a certain per cent. of the capital stock, and that charters should have no force after two years unless action should be taken, etc., applied only to charters granted by the courts under the general law, and not to those granted directly by the legislature.[247]

§ 49. Time of acquiring corporate existence.—A corporation comes into existence as such as soon as the charter is accepted in accordance with its terms, and not before such acceptance. For this purpose, a valid acceptance includes the performance of all conditions precedent prescribed by the statute.

It is important to determine the exact time at which a corporation comes into existence, for until then it cannot, in the nature of things, legally act as a corporation. "That a corporation," said the Illinois supreme court, "should have a full and complete organization and existence as an entity before it can enter into any kind of a contract or transact any business, would seem to be self-evident. * * * A corporation, until organized, has no being, franchise or faculties. Nor do those en-

[246] Franklin Bridge Co. v. Wood, 14 Ga. 80, 1 Cum. Cas. 42, 1 Smith's Cas. 65, 1 Keener's Cas. 85; Ex parte Burns, 1 Tenn. Ch. 83; People v. Chicago Gas Trust Co., 130 Ill. 268; Sparks v. Woodstock Iron & Steel Co., 87 Ala. 294; Ex parte Spring Valley Water Works, 17 Cal. 132; State v. Taylor, 55 Ohio St. 61. But see People v. Rice, 68 Hun (N. Y.) 24; Mitcheson v. Harlan (Pa.) 7 Am. Law Reg. 468. Where an officer wrongly refuses to file the declaration and statement on reincorporation on the ground that the name adopted is similar to that of another corporation, mandamus will lie to compel him to do so. People v. Payn, 161 N. Y. 229, affirming 60 N. Y. Supp. 1146, 43 App. Div. 621, which affirmed 28 Misc. Rep. 275.

[247] City of Atlanta v. Gate City Gas Light Co., 71 Ga. 106.

gaged in bringing it into being have any power to bind it by contract, unless so authorized by the charter. Until organized as authorized by the charter there is not a corporation, nor does it possess franchises or faculties for it or others to exercise, until it acquires a complete existence."[248]

Acceptance of charter.—Since, in the case of a private corporation, an acceptance of the charter, express or implied, is necessary, an association of persons to whom a charter is granted by the legislature does not become a corporation until such acceptance. It does become a corporation, however, as soon as the charter is accepted, provided the acceptance is in substantial compliance with the terms of the charter, and the corporation may at once elect its officers and proceed to transact its business.[249] If a charter is granted unconditionally upon application therefor, it takes effect at once.[250]

Performance of conditions precedent.—The valid acceptance of a charter includes the performance of all conditions precedent prescribed by the legislature. Therefore, when a corporation is organized under a general law, it does not come into existence until all the conditions precedent prescribed by the statutes are complied with.[251] What are to be construed as conditions precedent, what constitutes a compliance with them, and the effect of failure to comply with them is considered in other

[248] Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652. See, also, McVicker v. Cone, 21 Or. 353. And see post, § 100.

[249] Goshen & S. Turnpike Co. v. Sears, 7 Conn. 86; Hudson v. Carman, 41 Me. 84; Riddle v. Proprietors of the Locks & Canals on Merrimack River, 7 Mass. 184; Com. v. Worcester Turnpike Corp., 3 Pick. (Mass.) 327.

[250] Logan v. McAllister, 2 Del. Ch. 176.

[251] Hunt v. Kansas & Missouri Bridge Co., 11 Kan. 412; McVicker v. Cone, 21 Or. 353; Utley v. Union Tool Co., 11 Gray (Mass.) 139, 1 Cum. Cas. 967; Mokelumne Hill Canal Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Borough of Braddock v. Penn Water Co., 189 Pa. St. 379; Stowe v. Flagg, 72 Ill. 397; Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652; Walker v. Devereaux, 4 Paige (N. Y.) 229; Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; Chase v. Lord, 77 N. Y. 1; Bergeron v. Hobbs, 96 Wis. 641; Chicago, Kansas & W. R. Co. v. Stafford County Com'rs, 36 Kan. 121.

Where the articles of association are signed upon the understanding that they shall not take effect until the happening of a certain contingency, they do not become effective, and no corporation exists until such contingency happens. Corey v. Morrill, 61 Vt. 598.

sections.[252] As soon as all conditions precedent are performed, corporate existence attaches.[253]

When an incorporating act requires nothing to be done by the corporators named therein as a condition precedent to their acquiring corporate existence, they become a corporation immediately upon the passage of the act and its acceptance by them.[254] An act passed on application, incorporating unconditionally persons already associated in business, vests the franchise immediately upon its passage.[255]

When organization is necessary to give an association a corporate existence, its corporate life dates from its organization, and not from the time it begins to do business.[256]

II. Corporate Name.

§ 50. In general. A name of some kind is essential to the existence of a corporation; but except in so far as there may be restric-

[252] Ante, § 48; post, § 71.

[253] Atherton v. Sugar Creek & P. Turnpike Co., 67 Ind. 334; Hunt v. Kansas & Missouri Bridge Co., 11 Kan. 412; Hager v. Cleveland, 36 Md. 476; Columbia Bottom Levee Co. v. Meier, 39 Mo. 53; Burhop v. City of Milwaukee, 21 Wis. 257.

Under a statute requiring certificates of incorporation to be recorded in a certain office, and providing that "from thenceforth the subscribers and their associates and successors shall be a corporation for the purposes and upon the terms named in the said charter," the existence of a water company organized thereunder dates from the recording of its certificate, and not from the issue of letters patent, although another clause of the statute provides that water companies organized thereunder shall, "from the date of letters patent creating the same," have the powers conferred by the statute. Borough of Braddock v. Penn Water Co., 189 Pa. St. 379.

Under a statute providing that no corporation shall have legal existence until its articles of incorporation are recorded, and that the signers of the articles shall have direction of the corporation until the directors are elected, the existence of a corporation dates from the filing of the articles, and not subsequently when the subscribers meet for organization. Badger Paper Co. v. Rose, 95 Wis. 145.

[254] Blackwell v. State, 36 Ark. 178; Stoops v. Greenburgh & B. Plankroad Co., 16 Ind. 47; St. Joseph & Iowa R. Co. v. Shambaugh, 106 Mo. 557; Union Water Co. v. Kean, 52 N. J. Eq. 111; Brouwer v. Appleby, 1 Sandf. (N. Y.) 158; Cheraw & Chester R. Co. v. White, 14 S. C. 51, 1 Smith's Cas. 79. See post, § 73.

[255] Logan v. McAllister, 2 Del. Ch. 176.

[256] Hanna v. International Petroleum Co., 23 Ohio St. 622.

A corporation may acquire its corporate existence under a special or general law, although it has not yet complied with conditions precedent to its right to commence business or exercise the powers conferred. Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1; Muehlenbeck v. Babylon, North

tions in the charter or in the general law, common or statute, it may adopt any name it may see fit, and it may have several names for different purposes. A corporation cannot change its name without legislative authority.

Necessity for a name.—As was shown in a previous chapter, a corporate name is essential to the existence of a corporation, for without a name of some kind it could not enter into contracts, or take, hold, and grant property, or sue and be sued.[257] "When a corporation is erected," said Blackstone, "a name must be given to it; and by that name alone it must sue and be sued, and do all legal acts; though a very minute variation therein is not material. Such name is the very being of its constitution; and, though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions."[258]

§ 51. Name by implication or usage.

The name of a corporation need not necessarily be given in express terms by the statute creating it, for a corporation may have a name by implication or by adoption and usage. Thus, in an old case, where the king had incorporated the inhabitants of Dale, with power to choose a mayor annually, without giving the corporation a name, it was held to be a good corporation by the name of the "Mayor and Commonalty of Dale."[259] If no name is given a corporation on its creation, the corporators may adopt one. That a corporate name may be acquired by usage and reputation has repeatedly been held.[260]

§ 52. Several names—Use of assumed name.

It has been said that when a certain name is given to a corporation by its charter and adopted, the corporation can, in

Shore R. Co., 26 Misc. Rep. (N. Y.) 136. And see post, § 73.

[257] Ante, § 11.

[258] 1 Bl. Com. 474, 475.

[259] Anon., 1 Salk. 191.

[260] Anon., 3 Salk. 162; Knight v. Mayor, Masters & Burgesses of Wells, 1 Ld. Raym. 80; Dutch West India Co. v. Van Moses, 1 Strange, 612; Smith v. Tallassee Branch of Central Plankroad Co., 30 Ala. 650; South School Dist. v. Blakeslee, 13 Conn. 227; Sykes v. People, 132 Ill. 32; Alexander v. Berney, 28 N. J. Eq. 90.

general, act by no other name.[261] This, however, is not true, unless there is a statutory provision to such effect. A corporation may have more than one name. It may have one name in which to contract, etc., and another name in which to sue and be sued. It may thus acquire several names, either by express provision of the statute creating it, or by user and reputation.[262] A corporation, as we have seen, may be permitted by statute to contract, and to take, hold, and convey property, in its regular corporate name, and to sue and be sued in some other name, as in the name of its president.[263]

Effect of misnomer.—While a corporation must have a name in which to contract, to grant and receive property, and to sue and be sued, it does not follow that misnomer of a corporation in a contract, grant, will, or pleading will be fatal. On the contrary, it is well settled that, in the absence of statutory provision to the contrary, misnomer of a corporation is no more fatal than misnomer of an individual would be under the same circumstances. The general rule is that misnomer of a corporation will not invalidate a grant or conveyance to or by it, or a contract with it, or a devise or legacy to it, if it appears from the instrument itself, or is shown by parol evidence, that it is the corporation intended.[264]

[261] Glass v. Tipton, T. & B. Turnpike Co., 32 Ind. 376.

[262] Hardr. 504; Anon., 3 Salk. 102; Minot v. Curtis, 7 Mass. 441; Ferry v. Cincinnati Underwriters, 111 Mich. 261; Society for Propagating the Gospel v. Young, 2 N. H. 310; Walrath v. Campbell, 28 Mich. 111; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1; Woodrough & Hanchett Co. v. Witte, 89 Wis. 537; Marmet Co. v. Archibald, 37 W. Va. 778.

[263] Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Smith's Cas. 4, 1 Cum. Cas. 1; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 1 Smith's Cas. 1, 1 Keener's Cas. 9, 1 Cum. Cas. 26; ante, § 11.

[264] That misnomer of a corporation in a simple contract in writing, or a bond or other contract under seal, or in a grant or conveyance to or by it, is not fatal, if its identity is established, is well settled. See Culpeper Agricultural & Mfg. Co. v. Digges, 6 Rand. (Va.) 165, 18 Am. Dec. 708; Berks & Dauphin Turnpike Road v. Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402; Milford & C. Turnpike Co. v. Brush, 10 Ohio, 111, 36 Am. Dec. 78; Hoboken Building Ass'n v. Martin, 13 N. J. Eq. 427; Chadsey v. McCreery, 27 Ill. 253; Northwestern Distilling Co. v. Brant, 69 Ill. 658; Glass v. Tipton, T. & B. Turnpike Co., 32 Ind. 376; Coulter v. Western Theological Seminary, 29 Md. 69; Hagerstown Turnpike Road Co. v. Creeger, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495; Chilton v. Brooks, 71 Md. 445;

With respect to actions by and against corporations, the general rule is that misnomer of the corporation can only be taken advantage of by plea in abatement. It cannot be pleaded in bar, nor made the ground of a motion in arrest of judgment, or for a nonsuit. Nor is it ground for opening a judgment or decree.[265]

Use of assumed name.—A corporation may assume a name, just as a natural person may, for the purpose of entering into a contract or executing or receiving a conveyance, unless there is some express provision to the contrary in its charter or some other statute. If a note or deed is executed by a cor-

Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Kentucky Seminary v. Wallace, 15 B. Mon. (Ky.) 35; New York African Society v. Varick, 13 Johns. (N. Y.) 38; Douglass v. Branch Bank at Mobile, 19 Ala. 659; Smith v. Tallassee Branch of Central Plank-Road Co., 30 Ala. 650; Thatcher v. West River Nat. Bank, 19 Mich. 196; Newport Mechanics' Mfg. Co. v. Starbird, 10 N. H. 123, 34 Am. Dec. 145; Ashville Division No. 15 v. Aston, 92 N. C. 578; Marmet v. Archibald, 37 W. Va. 778; Adler v. Kansas City, S. & M. R. Co., 92 Mo. 242; Clarke v. Milligan, 58 Minn. 413; Woodrough v. Witte, 89 Wis. 537; Hasselman v. Japanese Development Co., 2 Ind. App. 180; Clement v. City of Lathrop, 18 Fed. 885; Rex v. Haughley, 1 Barn. & Adol. 655; District of Brock v. Bowen, 7 Upper Can., Q. B., 471; Precious Blood Society v. Elsythe, 102 Tenn. 40.

It is also well settled that a devise or legacy to a corporation is good notwithstanding a misnomer of the corporation, if it is shown that it is the corporation intended. First Parish in Sutton v. Cole, 3 Pick. (Mass.) 232; Minot v. Boston Asylum, 7 Metc. (Mass.) 416; Vansant v. Roberts, 3 Md. 119; St. Louis Hospital Ass'n v. Williams, 19 Mo. 609; North Carolina Institute v. Norwood, Busb. Eq. (N. C.) 65; Ryan v. Martin, 91 N. C. 464; New York Inst. v. How, 10 N. Y. 84; Button v. American Tract Society, 23 Vt. 336; Newell's Appeal, 24 Pa. St. 197; Washington & Lee University's Appeal, 111 Pa. St. 572; Preachers' Aid Society v. Rich, 45 Me. 552; In re Kilbert's Trusts, L. R. 7 Ch. App. 170; Attorney General v. Mayor, etc., of Rye, 7 Taunt. 546.

Misnomer of a corporation in a statute amending its charter does not render the statute inapplicable to it, if it appears that it is the corporation intended by the act. Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372; Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425.

Misnomer of a corporation in a tax assessment does not invalidate the assessment, where there is no question as to its identity. Souhegan Nail, Cotton & Woolen Factory v. McConihe, 7 N. H. 309.

[265] Baltimore & Potomac R. Co. v. Fifth Baptist Church, 137 U. S. 568; Virginia & M. Steam Nav. Co. v. United States, Taney (U. S.) 418, Fed. Cas. No. 16,973; Brunham v. Strafford County Savings Bank, 5 N. H. 446; State v. Bell Telephone Co., 36 Ohio St. 296; Coulter v. Western Theological Seminary, 29 Md. 69; Wilson v. Baker, 52 Iowa, 123; School District v. Griver, 8 Kan. 224; Lake Superior Building Ass'n v. Thomp-

poration under an assumed name, it is just as much bound as if it had used its proper name, and the same is true of any other contract. A contract entered into by or with a corporation under an assumed name may be enforced by either of the parties, if the identity of the corporation is established by the proof.[266]

§ 53. Selection of name.

(a) In general.—Unless it is otherwise provided in the statute under which a corporation is formed, or some other statute,[267] the members or officers of a corporation, or proposed corporation, may select any name they may see fit,[268] provided they do not select one which has previously been adopted and is being used by another corporation of the same state.[269]

(b) Name of another corporation, or similar name.—At common law, and in some states under express statutory provision, a corporation cannot select a name which is the same as, or very similar to, that of another corporation created by or under the laws of the same state, for, like the right to use a trademark, a

son, 32 Mich. 293; Bute Refrigerating Co. v. Gillett, 31 Fed. 809; Gilbert v. Nantucket Bank, 5 Mass. 97; Medway Cotton Manufactory v. Adams, 10 Mass. 360; Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526; Methodist Episcopal Church v. Tryon, 1 Denio (N. Y.) 451; Whittlesey v. Frantz, 74 N. Y. 456; Northumberland County Bank v. Eyer, 60 Pa. St. 436; First Nat. Bank v. Huntington Distilling Co., 41 W. Va. 530, 56 Am. St. Rep. 878.

[266] Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Mount Palatine Academy v. Kleinschnitz, 28 Ill. 133; Hasselman v. Japanese Development Co., 2 Ind. App. 180; Marmet v. Archibald, 37 W. Va. 778; Ferry v. Cincinnati Underwriters, 111 Mich. 261; Woodrough & Hanchett Co. v. Witte, 89 Wis. 537; Culpeper Agricultural & Mfg. Co. v. Digges, 6 Rand. (Va.) 165, 18 Am. Dec. 708; Neff v. Covington Stone & Sand Co. (Ky.) 55 S. W. 697; and cases cited in note 264, supra.

In a late Michigan case, where two insurance companies, in issuing a policy, used a name to designate both of them, it was held that they might be sued under that name. Ferry v. Cincinnati Underwriters, 111 Mich. 261.

[267] Under a statute forbidding a corporation to take the name of a person or firm without adding the word "company" or "corporation," together with some word designating the business, it was held that the name "Mallinckrodt Chemical Works" was not objectionable, although the first word was a family name. State v. McGrath, 75 Mo. 424.

[268] See Elgin Butter Co. v. Elgin Creamery Co., 155 Ill. 127.

[269] As to the effect of a conveyance to a corporation after it has changed its name to the same name as that of another company, see post, § 54.

corporation has the exclusive right to the use of its corporate name.[270]

——**Refusal of certificate.**—If corporators, therefore, select a name which has previously been adopted and is used by another corporation of the same state, an order or certificate of incorporation should be refused.[271]

[270] Newby v. Oregon Cent. Ry. Co., Deady, 609, Fed. Cas. No. 10,-144; Ex parte Walker, 1 Tenn. Ch. 97; Holmes, Booth & Haydens Co. v. Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324; Red Polled Cattle Club v. Red Polled Cattle Club, 108 Iowa, 105; Illinois Watch Case Co. v. Pearson, 140 Ill. 423; Ottoman Cahvey Co. v. Dane, 95 Ill. 203; Elgin Butter Co. v. Elgin Creamery Co., 155 Ill. 127; Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 769; State v. McGrath, 92 Mo. 355; Tussaud v. Tussaud, 44 Ch. Div. 678; In re First Presbyterian Church of Harrisburg, 2 Grant's Cas. (Pa.) 240.

It has been held that this principle should not be applied with strictness to actions for infringement of the right to the exclusive use of a name between corporations formed for patriotic or unselfish ends. Colonial Dames of America v. Colonial Dames of State of New York, 29 Misc. Rep. (N. Y.) 10. But this can only be because and when there is no injury or prejudice. Society of the War of 1812 v. Society of the War of 1812 of New York, 46 App. Div. (N. Y.) 568.

Under the New York statutes prohibiting the filing of the certificate of a proposed corporation having the same or a similar name to that of another corporation, but allowing a corporation formed by reincorporation to have the same name as that of the former corporation, a company is entitled to its former name on reincorporation, although it may be the same as or similar to the name of an existing corporation. People v. Payn, 161 N. Y. 229, affirming 60 N. Y. Supp. 1146, 43 App. Div. 621, which affirmed 28 Misc. Rep. 275.

Where a corporation of one state has been transacting business in another state, with its consent, express or implied, under a certain name, it has a right to continue using such name, notwithstanding the subsequent creation of a domestic corporation in such state with the same name. Reed v. Wilmington Steamboat Co., 1 Marv. (Del.) 193.

A corporation cannot acquire an exclusive right to use in its name the name of a particular place, or a substantive word which is commonly used in the language to designate a product, or a particular process, etc. Thus it was held in a late Connecticut case (where authorities are collected) that a corporation of the name "Hygeia Distilled Water Co." had no exclusive right, as against other corporations, to the use of the word "Hygeia," and that another corporation might adopt the name, "Hygeia Ice Co." Hygeia Distilled Water Co. v. Hygeia Ice Co., 72 Conn. 646, modifying 70 Conn. 516.

[271] State v. McGrath, 92 Mo. 355; In re First Presbyterian Church of Harrisburg, 2 Grant's Cas. (Pa.) 240.

And an application under a general law to change the name of a corporation will be denied where the name selected is similar to that of another company. See post, § 55.

Where an officer wrongfully refuses to file the declaration and statement on reincorporation, on the ground that the name of the association is similar to that of another association, he may be compelled to do so by mandamus.

——**Injunction.**—If necessary, a suit may be maintained to prevent incorporation under the same name as that of another corporation, or, if incorporation has already been effected, the use of the same name as that of another corporation will be enjoined at the suit of the latter, on the same principles upon which courts of equity enjoin the wrongful use of another's trademark.[272]

People v. Payn, 161 N. Y. 229, affirming 60 N. Y. Supp. 1146, 43 App. Div. 621, which affirmed 28 Misc. Rep. 275.

[272] Tussaud v. Tussaud, 44 Ch. Div. 678; Newby v. Oregon Cent. Ry. Co., Deady, 609, Fed. Cas. No. 10,144; Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 769; Holmes, Booth & Haydens Co. v. Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324; Ex parte Walker, 1 Tenn. Ch. 97; Lamb Knit Goods Co. v. Lamb Glove & Mitten Co., 120 Mich. 159; St. Patrick's Alliance v. Byrne (N. J. Eq.) 44 Atl. 716; Aiello v. Montecalfo, 21 R. I. 496; and other cases cited in note 270, supra.

In a late Iowa case it was held that the certificate of the state auditor authorizing a corporation to do business under a certain name did not affect the rights of another corporation having the same name, and which was not advised of the attempt to adopt its name. Grand Lodge A. O. U. W. v. Graham, 96 Iowa, 592.

But in a late Massachusetts case, under a statute relating to the organization of fraternal beneficial associations, and prohibiting the adoption of a name previously in use, or so similar as to be liable to be mistaken for it, and authorizing the insurance commissioner to issue a certificate "if it appears that the purposes and proceedings of the corporation conform to law," and making the certificate of the secretary of the commonwealth "conclusive evidence of the existence of such corporation," it was held that a bill could not be maintained by one corporation to restrain another from using a name similar to its own, as the certificates of the commissioner and secretary were conclusive as to the right to use the name. American Order of Scottish Clans v. Merrill, 151 Mass. 558.

It was also held in this case that the insurance commissioner cannot be enjoined from issuing a certificate on the ground that the name of the new corporation is so similar to that of an existing corporation as to be liable to be mistaken for it, as he is the person, under the statute, to pass upon that question.

A statute providing that the articles of association of a corporation shall state its name, which shall not be a name in use by any other corporation of the state, does not authorize assumption of the same name as that of an unincorporated society, and a court of equity will enjoin it at the instance of the members of the society. Aiello v. Montecalfo, 21 R. I. 496.

In Paulino v. Portuguese Beneficial Ass'n, 18 R. I. 165, it was held that the members of a voluntary association could not maintain a bill to enjoin the use of its name by a corporation, where the act of incorporation fixed that as the name of the corporation, since the right to use the name, when so fixed, was a part of the franchise of the corporation.

An injunction restraining a corporation from using its name because of similarity to that of another corporation does not operate as a practical dissolution of the corporation, where there is a stat-

It was said in a late New York case: "In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the similation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the latter corporation to obtain, by reason of the similarity of names, the business of the prior one. The courts interfere in these cases, not on the ground that the state may not affix such corporate names as it may elect to the entities it creates, but to prevent fraud, actual or constructive."[273]

This principle applies where the name selected is so much like the name of another corporation as to mislead, although it may not be precisely the same.[274] But it does not apply, although there may be some similarity, if there is no fraud or fraudulent intent, and if it is not made to appear that injury has resulted or is likely to result.[275]

There is no restriction on the right of a corporation to take

ute under which it may choose another name. Armington v. Palmer, 21 R. I. 109.

[273] Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 769.

[274] Thus, in a Missouri case it was held that a corporation could not adopt the name "Kansas City Real Estate Exchange," where there was an existing corporation with the name "Kansas City Real Estate and Stock Exchange." State v. McGrath, 92 Mo. 355. And see Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 769; Lamb Knit Goods Co. v. Lamb Glove & Mitten Co., 120 Mich. 159; and other cases cited in the notes preceding.

[275] Hygeia Water Ice Co. v. New York Hygeia Ice Co., 140 N. Y. 94, affirming 65 Hun, 619; Kochler v. Sanders, 122 N. Y. 65; Richardson & Boynton Co. v. Richardson & Morgan Co., 55 Hun (N. Y.) 606; Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436; Elgin Butter Co. v. Elgin Creamery Co., 155 Ill. 127; Nebraska Loan & Trust Co. v. Nine, 27 Neb. 507, 20 Am. St. Rep. 686; Drummond Tobacco Co. v. Randel, 114 Ill. 412; Southern Medical College v. Thompson, 92 Ga. 564.

The fact that there is a corporation by the name of the "North Fifth Street Real Estate Company" is no ground for refusing a charter to a corporation under the name of the "North Fifth Street Mutual Land Association." In re North Fifth St. Mut. Land Ass'n, 8 Pa. Co. Ct. Rep. 15.

In Nebraska Loan & Trust Co. v. Nine, 27 Neb. 507, 20 Am. St. Rep. 686, it was held that a loan and trust company which had adopted the name of the state as part of its corporate name, as in the above citation, was not entitled to an injunction restraining a similar use of the name of the state by another such company doing business at a point one hundred miles distant, where the proof did not show any conflict of interest, or that the plaintiff's business would be materially interfered with.

the same name as that of a corporation of another state or country, or a similar name, unless it is prohibited by statute.[276]

§ 54. Effect of similarity of names upon property rights.

The fact that two corporations have the same name does not make them the same, or in any way affect their property rights. They are just as distinct as two natural persons having the same name, and will be protected in their respective property rights to the same extent. Thus, if two corporations have the same name, and the sheriff, having an execution against one of them, levies upon the property of the other, he is liable to the latter in an action of trespass.[277] Contracts or conveyances by or to one of such corporations cannot confer rights or impose liabilities on the other.[278]

§ 55. Change of name—Power to change.

In the absence of express authority from the state, a corporation, although it may act in an assumed name, as heretofore explained, cannot abandon a name which has been given to it by the legislature in its creation, and adopt another as its proper name.[279] But the state may change its name with its consent, or may authorize it to do so.[280]

[276] Lehigh Valley Coal Co. v. Hamblen, 23 Fed. 225; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598; People v. Home Life Assurance Co., 111 Mich. 405.

A corporation of one state, although permitted to do business in another state, is not an "organization" of the latter state within the meaning of a statute prohibiting corporations from adopting a name in use by any other organization of the state. People v. Home Life Assurance Co., 111 Mich. 405.

[277] Hallowell & Augusta Bank v. Howard, 14 Mass. 182.

[278] See Clark v. Milligan, 58 Minn. 413; post, § 55, note 287.

[279] Reg. v. Registrar, 10 Q. B. 839; Shackleford v. Dangerfield, L. R. 3 C. P. 407; Sykes v. People, 132 Ill. 32; Glass v. Tipton, T. & B. Turnpike Co., 32 Ind. 376; Bellows v. Hallowell & Augusta Bank, 2 Mason, 31, Fed. Cas. No. 1,279.

[280] See the cases cited in the note following, and in the succeeding notes.

An unauthorized change of name by a corporation is merely inoperative. It does not affect the existence of the corporation. O'Donnell v. Johns, 76 Tex. 362.

If a corporation changes its name and place of business under an unconstitutional law, and afterwards exercises corporate powers under the new name, it is at least a de facto, if not a de jure, corporation. Richards v. Minnesota Savings Bank, 75 Minn. 196.

Effect of change.—A change in the name of a corporation, either by the legislature or by the corporators or stockholders under legislative authority, does not affect the identity of the corporation, or in any way affect the rights, privileges, or obligations previously acquired or incurred by it.[281] Thus, where the title to land was vested in a corporation sole by the name of "The Right Reverend M., Bishop of L., and his successors in office," it was held that an act of the legislature changing the name by omitting the words "and his successors in office" did not either divest the title or require a conveyance from the corporation under the old name to the corporation under the new.[282]

Mode of changing name.—The name of a corporation may be thus changed from time to time, either by special legislation or under a general law. The fact that the constitution prohibits the legislature from creating a corporation by special act, or from granting corporate powers and privileges by special act, does not render void a special act merely changing the name of a corporation, or authorizing it to be changed by the corporation.[283]

In many jurisdictions there are provisions in general laws under which a corporation may change its name under certain conditions, or upon complying with certain formalities.[284]

[281] 1 Rolle, Abr. 513, 572; 4 Coke, 87b; Girard v. Philadelphia, 7 Wall. (U. S.) 1; Shackleford v. Dangerfield, L. R. 3 C. P. 407; Welfley v. Shenandoah I., L., M. & M. Co., 83 Va. 768; Trinity Church v. Hall, 22 Conn. 125; Episcopal Charitable Soc. v. Episcopal Church, 1 Pick. (Mass.) 372; McCloskey v. Doherty, 97 Ky. 300; Cahill v. Bigger, 8 B. Mon. (Ky.) 211; Dean v. La Motte Lead Co., 59 Mo. 523; Rosenthal v. Madison & Indianapolis Plankroad Co., 10 Ind. 358; West v. Carolina Life Ins. Co., 31 Ark. 476; Hazelett v. Butler University, 84 Ind. 230. Compare Crane Co. v. Specht, 39 Neb. 123, 42 Am. St. Rep. 562.

[282] McCloskey v. Doherty, 97 Ky. 300.

[283] Wallace v. Loomis, 97 U. S. 146; Attorney General v. Joy, 55 Mich. 94; Hazelett v. Butler University, 84 Ind. 230; ante, § 39(c) (4).

[284] As to the construction of such statutes, see Wells v. Oregon Ry. & Nav. Co., 15 Fed. 516; Anthony v. International Bank, 93 Ill. 225; Hazelett v. Butler University, 84 Ind. 230; Chicago, Dubuque & M. R. Co. v. Keisel, 43 Iowa, 39; In re First Presbyterian Church of Bloomfield, 107 Pa. St. 543, 111 Pa. St. 156; In re Bank of North America, 2 Pa. Co. Ct. R. 97; In re United States Mercantile Reporting & Collecting Agency, 115 N. Y. 176.

As to proof of change, and presumption of regularity, see Wells

Selection of name similar to that of another company.—Under such a statute, a court will not authorize a corporation to change its name, or sanction a change, if the new name is so similar to that of an existing domestic corporation that confusion, deceit, or injury may result.[285] If a corporation does change its name to the same name as that of another company, the use of the new name may be enjoined.[286] If the corporation takes a conveyance of land in the new name, the conveyance does not vest the title in the other company.[287]

Acceptance of change.—A change in the name of a corporation by a special act is an amendment of its charter, and, like other amendments, must be accepted by the corporation.[288]

Continuing use of original name after change.—It has been held in New Jersey that, although the name of a corporation

v. Oregon Ry. & Nav. Co., 15 Fed. 561, Anthony v. International Bank, 93 Ill. 225; Chicago, Dubuque & M. R. Co. v. Keisel, 43 Iowa, 39; King v. Ilwaco Ry. & Nav. Co., 1 Wash. 127.

As to the discretion of the court in New York, see In re United States Mercantile Reporting & Collecting Agency, 115 N. Y. 176.

A statute allowing any religious, benevolent, literary, scientific, "or other corporation," or any corporation having, or being known by, the name of any benevolent or charitable society, to apply for a change of its name, is not limited to corporations of the kind specifically enumerated, but applies to corporation for pecuniary profit. In re La Societe Francaise, 123 Cal. 525.

[285] In re United States Mortgage Co., 83 Hun (N. Y.) 572; In re Manhattan Dispensary, 7 N. Y. St. Rep. 871: And see supra, § 53.

In Illinois it is expressly provided by statute that "in changing the name of any corporation, * * * no name shall be assumed or adopted * * * similar to * * * the name of any other corporation organized under the laws" of the state. Act March 26, 1872, § 1. Under this provision, a corporation cannot change its name so as to adopt a name used by a corporation which, although not fully organized, has received its license for incorporation, even though such license was obtained after the directors of the former company had called and published notice of a meeting to vote on the proposed change of name. Illinois Watch Case Co. v. Pearson, 140 Ill. 423.

[286] Illinois Watch Case Co. v. Pearson, 140 Ill. 423. See ante, § 53(b).

[287] Clarke v. Milligan, 58 Minn. 413. In this case, a corporation changed its name to the K. Iron Co., and took and recorded a deed to land in that name, being ignorant at the time that there was another corporation of the same name. The plaintiffs saw the record, and, supposing that the property belonged to the original corporation of that name, transferred property to it and took shares of its stock in payment. It was held that title to the land did not vest in the original company.

[288] Alexander v. Berney, 28 N. J. Eq. 90. Compare Hazelett v. Butler University, 34 Ind. 230.

has been changed by an act of the legislature, if the corporation continues to conduct its business in its original name, and otherwise exclusively uses that name after the passage of the act, it may regain such name by usage, and sue and be sued thereby.[289]

Estoppel to question validity of change.—A person who deals with a corporation after a proceeding by which it has changed its name will be estopped, in an action based upon such dealing, to deny the validity of the proceeding and the change of name. This principle was applied to a subscriber to the stock of a corporation, in an action on the subscription, although the subscription recognized the old name of the corporation.[290]

Actions and judgments.—Since a mere change in the name of a corporation does not affect its identity, or in any way affect the rights, privileges, and obligations acquired or incurred before the change, it follows that a corporation, after its name has been changed, may sue and be sued in the new name on contracts made before the change.[291]

The fact that the proceedings to change its name were irregular, or even void, cannot necessarily be set up to defeat an action by it in its new name. In the first place, as we have seen, a person contracting with it after the change will be estopped to deny the validity of the change in an action on the contract in the new name.[292] And even where there is no element of estoppel, an action may be maintained and a valid judgment obtained in the new name.

It has been held, for example, that the maker of a note to a corporation cannot defend against an action thereon by a receiver of the corporation on the ground that the name of the

[289] Alexander v. Berney, 28 N. J. Eq. 90.

[290] Greeneville & P. R. Narrow Guage R. Co. v. Johnson, 8 Baxt. (Tenn.) 332.

[291] Dean v. La Motte Lead Co., 59 Mo. 523; Episcopal Charitable Society v. Episcopal Church, 1 Pick. (Mass.) 372; Delaware & Atlantic R. Co. v. Quick, 23 N. J. Law, 321; Cahill v. Bigger, 8 B. Mon. (Ky.) 211; Trustees of Northwestern College v. Schuyler, 37 Iowa, 577; Rosenthal v. Madison & Indianapolis Plankroad Co., 10 Ind. 358. And see note 281, supra.

As to an action in the original name after having continued to use it notwithstanding a change by the legislature, see supra, this section.

[292] Supra, this section.

corporation was changed after the note was executed, and the receiver was appointed in proceedings brought against it in the new name, and that the proceedings for changing the name were void, where the complaint showed the identity of the corporation for which the receiver was appointed, and the one named as payee in the note.[293]

And it has been held that, where a corporation attempts to change its name, but fails by reason of noncompliance with the statute, and afterwards sues and obtains a judgment in the new name, the judgment is good if the complaint identifies the corporation.[294]

§ 56. Judicial notice of name.

If a corporation has been created and named by a public act, the courts will take judicial notice thereof, for they must take judicial notice of all public acts.[295] It is otherwise, however, when a corporation has been created and named by a private act or a foreign act.[296] And where the name of a corporation has not been given it by act of the legislature, but has been selected and adopted by the corporators in organizing under a general law, the court cannot take judicial notice of it. In such a case it must be proved.[297]

III. Amendment, Extension, and Revival of Charters.

§ 57. Amendment of charters—(a) In general.—The state may at any time amend the charter of a corporation, without its consent, if the power to amend or repeal has been reserved in granting the same, or with its consent, if such power to amend or repeal has not been reserved; but in either case, acceptance of the amendment is necessary before rights can be acquired or obligations incurred under it.

Unless formalities are required by the statute, such acceptance may be implied from the exercise of powers under the charter as amended.

[293] Hyatt v. McMahon, 25 Barb. (N. Y.) 457.

[294] King v. Ilwaco Ry. & Nav. Co., 1 Wash. 127.

[295] Jackson v. State, 72 Ga. 28. See post, § 65.

[296] See post, § 65.

[297] Johnson v. City of Indianapolis, 16 Ind. 227; Holloway v. Memphis, El Paso & P. R. Co., 23 Tex. 465, 76 Am. Dec. 68. Compare Pendleton v. Bank of Kentucky, 1 T. B. Mon. (Ky.) 171.

Amendment of a charter does not create a new corporation, or affect rights or obligations previously acquired or incurred.

(b) Power to amend.—As we shall see more at length in another chapter, the provision in the constitution of the United States that no state shall pass any law impairing the obligation of contracts prevents the legislature of a state from either repealing or amending the charter of a private corporation without the consent of the corporation, unless it has reserved the power to amend or repeal in granting the charter.[298] It may amend, however, even without the consent of the corporation, if such power has been reserved,[299] though, as we shall see, acceptance of the amendment is necessary to put the charter as amended into operation.[300] And, although the legislature may not have reserved the power to amend or repeal a charter, it may nevertheless amend at any time with the consent of all the members of the corporation, and to some extent with the consent of a majority,[301] provided there is no constitutional prohibition in the way.[302]

(c) General and special laws.—In the absence of constitutional prohibition, the legislature may amend charters or authorize their amendment by either special or general laws. In some states, however, as we have seen in a previous section, the constitution in terms prohibits amendments as well as creation of corporations by special act. And even when the constitution in terms prohibits the *creation* only of corporations by special

[298] Post, § 270.

[299] Post, § 273.

[300] Post, § 279.

[301] State v. Montgomery Light Co., 102 Ala. 594; Phinney v. Sheppard & Enoch Pratt Hospital, 88 Md. 633; University of Maryland v. Williams, 9 Gill & J. (Md.) 416; Jackson v. Walsh, 75 Md. 304; Ehrenzeller v. Union Canal Co., 1 Rawle (Pa.) 181; Farmers' & Mechanics' Bank of Shelbyville v. Jarvis, 1 T. B. Mon. (Ky.) 4. And see the other cases specifically cited in the notes following.

[302] A constitutional provision prohibiting the creation of corporations of a certain class, and providing that those already in existence shall continue, does not prevent the legislature from authorizing such a corporation to increase its capital stock. People v. Marshall, 6 Ill. 672.

An act amending the charter of a railroad company granted by a special act, by authorizing it to extend its road, and changing its name, does not violate a constitutional provision that no act shall be passed renewing or extending a special act of incorporation. Attorney General v. Joy, 55 Mich. 94.

An act amending the charter of

act, it is held by some courts that the prohibition extends also to the amendment of charters.[303]

In most of the states, the general laws authorizing the formation of corporations for various purposes also contain provisions under which the articles of association or certificate of incorporation may, subject to prescribed limitations, be amended at any time by the corporators or stockholders, or by a majority of them, by complying, as in the organization of a corporation, with certain conditions. The extent of the power of amendment under such a statute depends, of course, upon the terms of the statute, and it can only be exercised within the limitations and subject to the conditions thereby imposed.[304] Such statutes have been sustained by the courts.[305]

In amending a charter under a general law, or in accepting an amendment by a special act, all conditions precedent prescribed by the statute must be at least substantially complied with.[306]

a corporation, passed by the legislature of the state which created it, and which is valid in that state, cannot be attacked in that state on the ground that it violates the constitution of another state, in which the corporation has been authorized to do business. City of Covington v. Covington & Cincinnati Bridge Co., 10 Bush (Ky.) 69.

[303] Ante, § 39(c)(4).

[304] See Day v. Mill-Owners' Mut. Fire Ins. Co., 75 Iowa, 694; Detroit Chamber of Commerce v. Secretary of State, 109 Mich. 691; Mercantile Statement Co. v. Kneal, 51 Minn. 263; Grand River College v. Robertson, 67 Mo. App. 329; People v. Green, 116 Mich. 505.

In Ohio, for example, it is provided that a corporation organized under the general laws may amend its articles of incorporation so as to change its corporate name, or the place where it is to be located, or where its principle business is to be transacted, so as to modify, enlarge, or diminish the objects or purposes for which it is formed, or so as to add thereto anything omitted from, or which might lawfully have been provided for in, such articles originally: provided, however, that nothing contained in the section shall authorize a corporation, by amendment, to increase or diminish the amount of its capital stock, or to change substantially the original purposes of its organization. Rev. St. Ohio, § 3238a. See, as to this provision, State v. Taylor, 55 Ohio St. 61.

[305] State v. Montgomery Light Co., 102 Ala. 594, and cases cited in the preceding note.

[306] Day v. Mill-Owners' Mut. Fire Ins. Co., 75 Iowa, 694; Bowie v. Grand Lodge, 99 Cal. 392; State v. Taylor, 55 Ohio St. 61; Memphis & St. F. Plank Road Co. v. Rives, 21 Ark. 302; Golder v. Bressler, 105 Ill. 419. And see infra, this section, (e).

Under a statute authorizing a corporation to amend its charter so as to change its name, and so as to enlarge or diminish the purposes for which it was formed, but providing that the original pur-

In Pennsylvania, a general law provides for the amendment of charters by the court of common pleas on application of the corporation, and when, in the opinion of the court, the amendments are or will be lawful and beneficial.[307]

(d) Misnomer of corporations.—Misnomer of a corporation in a statute amending its charter does not render the statute inapplicable to it, if it clearly appears that it is the corporation intended by the act.[308]

(e) Acceptance of amendment—Necessity for acceptance.—When the legislature passes an act modifying or otherwise amending an existing charter, the amendatory act must, like an original charter, be accepted by the corporation or the corporators. Without this it will neither confer rights nor impose burdens.[309] It can make no difference that, in granting the

poses should not be substantially changed, it was held that a corporation organized to manufacture and furnish gas to light the streets and public and private buildings of a municipality might amend its charter so as to authorize it to employ for that purpose both gas and electricity. Picard v. Hughey, 58 Ohio St. 577.

But where a corporation was organized for the purpose of manufacturing gas and electricity, and furnishing the same for light, heat and power, and for such and other purposes as may be used by the citizens and corporations in a certain city, and its vicinity, it was held that an amendment of its articles so as to make it a gas, electric, and traction company, with power to acquire, own, operate, lease and maintain a street railroad in such city, to be operated by electricity or other motive power, for the conveyance of passengers, freight, express, and mail matter, over a certain route, and extending to such other points within or without the said city as may be selected, substantially changed the original purpose of the company, within the meaning of a statute allowing amendment of charters. State v. Taylor, 55 Ohio St. 61.

[307] See In re Evangelical Lutheran Church of St. Peter, 6 Pa. Dist. Ct. R. 412.

[308] Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372; Attorney General v. Chicago & Northwestern Ry. Co., 35 Wis. 425.

[309] Ante, § 44; Com. v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Yeaton v. Bank of Old Dominion, 21 Grat. (Va.) 593, 2 Smith's Cas. 808; Mulloy v. Nashville & Decatur R. Co., 8 Lea (Tenn.) 427; Alexander v. Berney, 28 N. J. Eq. 90; Green v. Seymour, 3 Sandf. Ch. (N. Y.) 285; Troy & Rutland R. Co. v. Kerr, 17 Barb. (N. Y.) 581; and other cases more specifically cited in the notes following.

A general law, providing that legislative amendments of the charters of corporations shall not become operative unless accepted by the corporation within a certain time and in a certain mode, does not apply to acts of the legislature which may be referred to the superintending or advisory power which a legislature has over a corporation which it has created. State v. New Haven & Northhampton Co., 43 Conn. 351.

original charter, the legislature reserved the power to revoke or amend it, for it has no more power to compel persons to continue as a private corporation under an amended charter than it has to create a private corporation in the first instance without the consent of the members.[310]

On this point it was said in a Virginia case: "The power of the legislature 'to repeal, alter, or modify the charter of any bank at its pleasure' must be held to be limited to this extent. It may certainly repeal the charter of any bank, but it cannot compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank without its acceptance. Banks are private corporations, created by a charter, or act of incorporation from the government, which is in the nature of a contract, and therefore, in order to complete the creation of such corporation, something more than the mere grant of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be accepted. * * * Though the legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification than it could have forced upon them the acceptance of the original charter without their consent." As was said, however, in this case, one of the consequences of refusal to accept the amendment is "that the corporation cannot conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body."[311]

As we have seen, a change of the name of a corporation by the legislature is an amendment of its charter, and, like other amendments, must be accepted by the corporation.[312]

——**Sufficiency of acceptance.**—An act amending the charter

[310] Yeaton v. Bank of Old Dominion, 21 Grat. (Va.) 593, 2 Smith's Cas. 808; Sage v. Dillard, 15 B. Mon. (Ky.) 340.

[311] Yeaton v. Bank of Old Dominion, 21 Grat. (Va.) 593, 2 Smith's Cas. 808, per Judge Christian. And see Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167.

[312] Ante, § 55; Alexander v. Berney, 28 N. J. Eq. 90.

of a corporation, like an original charter,[313] must be accepted as it is offered. It cannot be accepted in part only, or conditionally, unless this is authorized by the act. It was held, therefore, in a Tennessee case, that where an amendatory act was accepted in terms, but the acceptance was qualified by a proviso introducing a new condition, not authorized by the act, there was no acceptance, and the act did not become a part of the charter.[314]

——**Form, evidence, and presumption of acceptance.**—A statute amending the charter of a corporation may require that it shall be accepted in a certain way or with certain formalities, and in such a case a substantial compliance with the statute is necessary.[315] In the absence of express requirements in the statute, however, it is no more necessary to show a formal acceptance of an amendment of a charter than it is to show formal acceptance of an original charter. Even when the legislature has not reserved the power to amend a charter, the acceptance of an amendatory act may be implied from the exercise of powers under it.[316] Thus, acceptance of an amended charter may be

[313] Ante, § 44(c).

[314] Mulloy v. Nashville & Decatur R. Co., 8 Lea (Tenn.) 427.

[315] Ante, § 48.

Where an amendatory act provided that, before it should take effect, the president of the corporation should file a declaration of acceptance in the office of the secretary of state, it was held that such a declaration filed by an agent of the corporation, and subsequently ratified by the corporation, was a substantial compliance with the statute. Memphis & St. F. Plank Road Co. v. Rives, 21 Ark. 302.

And where a statute amending the charter of a bank required the bank to signify its acceptance in writing, under its seal, and signed by its president, it was held that a copy of an order of acceptance taken from the minutes of the proceedings of the directors, certified by the president and cashier under the seal of the bank, was a substantial compliance. Golder v. Bressler, 105 Ill. 419.

[316] Cincinnati, Hamilton & D. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729; Com. v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Lincoln & Kennebec Bank v. Richardson, 1 Me. 79, 10 Am. Dec. 34; Blandford Third School Dist. v. Gibbs, 2 Cush. (Mass.) 39; Owen v. Purdy, 12 Ohio St. 73; Goodin v. Evans, 18 Ohio St. 150; State v. Sibley, 25 Minn. 387; Lyons v. Orange, Alexandria & M R. Co., 32 Md. 18; Jackson v. Walsh, 75 Md. 304; Gibbs v. Baltimore Consolidated Gas Co., 130 U. S. 396; Bangor, Old Town & M. R. Co. v. Smith, 47 Me. 34; Illinois River R. Co. v. Zimmer, 20 Ill. 654; Kenton County Court v. Bank Lick Turnpike Co., 10 Bush (Ky.) 529; City of Covington v. Covington & Cincinnati Bridge Co. 10 Bush (Ky.) 69; Zabriskie v. Cleveland, Columbus & C. R. Co., 23 How. (U. S.) 381; State v. Lou-

implied from the fact that the corporators have elected officers under it,[317] or have made or taken a lease or conveyance of property which the amendment authorized it to make or take,[318] or have brought an action which they could not have brought without the amendment.[319] Since a corporation, though not bound to accept an amendment of its charter, even when the power to amend or repeal has been reserved by the legislature, has no right to continue its operations if it does not accept, continuance of business after such an amendment is equivalent to an acceptance.[320]

The acts relied upon as constituting an implied acceptance, particularly where the act imposes burdens upon the corporation, must clearly appear to have been done in pursuance and recognition of the legislation. If they are entirely consistent with an intention not to accept or recognize the act as binding, an acceptance cannot be implied.[321]

isiana State Bank, 20 La. Ann. 468; Fell v. McHenry, 42 Pa. St. 41; Wetumpka & Coosa R. Co. v. Bingham, 5 Ala. 657; State v. Montgomery Light Co., 102 Ala. 594; Vermont & C. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1; Madison, W. & M. Plankroad Co. v. Reynolds, 3 Wis. 287. And see ante, § 44(f).

In general, said the Ohio court, where the legislature confers upon a corporation additional and beneficial powers, without prescribing any mode for their acceptance, the exercise of such powers is sufficient evidence that they are accepted. And it was held that the rule applies as well when the powers are conferred by a general law, which is declared applicable to any one of a class of corporations that may accept its provisions, as when they are conferred by a special act upon a particular corporation. Goodin v. Evans, 18 Ohio St. 150. See, also, Dayton & Cincinnati R. Co. v. Hatch, 1 Disn. (Ohio) 84.

[317] Com. v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

[318] Cincinnati, Hamilton & D. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729; Vermont & C. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1.

[319] Lincoln & Kennebec Bank v. Richardson, 1 Me. 79, 10 Am. Dec. 34.

[320] Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167.

[321] See Mississippi & Rum River Boom Co. v. Prince, 34 Minn. 79.

In Pingry v. Washburn, 1 Atk. (Vt.) 264, it was held that the fact that, after an amendment of the charter of a turnpike company authorizing it to resurvey and alter its road, the company proceeded to survey the ground, but without making any record of the survey or any alteration of its road, did not show an acceptance of the amendment.

And in Stuart v. James River & Kanawha Co., 24 Grat. (Va.) 294, it was held that the execution by a corporation of a mortgage to secure money which it was authorized to borrow bv an act amending its charter was not an acceptance of the act, where it did not in fact borrow the money, and never made any use

As we shall presently see, acceptance by a corporation of an act amending its charter may be shown by its books and other records, if they are properly identified and authenticated, or, if such evidence is not available, by parol evidence.[322] And under some circumstances it will be presumed without any evidence at all.[323]

Authority to accept amendment.—The board of directors of a corporation, as its managers, have the authority and power to accept an act amending its charter, and bind the members and stockholders by such acceptance, if the amendment does not fundamentally change the constitution of the corporation, but merely confers some additional power or privilege, the exercise of which would be within the authority and powers of the board if it had originally been conferred upon the corporation by its charter. Thus it has been held that the board of directors of a railroad company, who are authorized by its laws to purchase land and locate and erect stations, may accept an act amending the charter of the corporation to the extent of allowing it to acquire land for a station under the power of eminent domain.[324]

If the amendment is such as to fundamentally change the constitution of the corporation, or if it confers powers or privileges which are not properly within the general authority vested by the members in the board of directors, the directors cannot bind the members by an acceptance, but the acceptance must be by the members themselves, as constituting the corporation. Thus it is for the members, and not for the board of directors, to accept an amendment authorizing the corporation to increase or decrease the capital stock.[325]

When the board of directors are authorized to accept an act

of the bonds intended to be secured by the mortgage.

[322] Post, § 66.

[323] Post, §§ 66, 67(f).

[324] Eastern R. Co. v. Boston & Maine Railroad, 111 Mass. 125, 15 Am. Rep. 13. See, also, Illinois River R. Co. v. Zimmer, 20 Ill. 654; Sprague v. Illinois River R. Co., 19 Ill. 174; Banet v. Alton & Sangamon R. Co., 13 Ill. 505.

[325] Chicago City Ry. Co. v. Allerton, 18 Wall. (U. S.) 233; Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90. See, also, Com. v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Brown v. Fairmount Gold & Silver Min. Co., 10 Phila. (Pa.) 32. See, also, State v. Oftedal, 72 Minn. 498.

amending the charter of a corporation, they must, in doing so, act in good faith, and with a view to promoting the general good of the corporation, or their action may be repudiated by the stockholders or members.[326]

——**Power of majority to bind minority.**—In organizing a corporation, as we shall see, the members impliedly agree that the minority will be bound by the vote of the majority on all questions which are properly within the scope of their charter; but the majority have no implied power to bind the minority by any fundamental change in the constitution or powers of the corporation.[327]

It follows from this that a majority of the stockholders or members of a corporation cannot bind the minority by accepting an amendment of its charter, if the amendment is of such a character as to fundamentally or radically alter the constitution or powers of the corporation.[328] According to this principle, subject to some conflict of opinion, however, it has been held that the majority cannot bind the minority by accepting an amendment consolidating the corporation with another corporation.[329]

A different rule applies to amendments which do not fundamentally or radically change the constitution or powers of the corporation, but merely confer some additional power auxiliary to the purposes for which the corporation was created. These may be accepted by a majority of the members, and their acceptance will be binding on the minority.[330] Alterations or

[326] Illinois River R. Co. v. Zimmer, 20 Ill. 654.

[327] Post, chapter xxiv.

[328] New Orleans, Jackson & G. N. R. Co. v. Harris, 27 Miss. 517; Black v. Delaware & Raritan Canal Co., 24 N. J. Eq. 455; Fry's Ex'r v. Lexington & Big Sandy R. Co., 2 Metc. (Ky.) 314. And see post, chapter xxiv.

[329] Clearwater v. Meredith, 1 Wall. (U. S.) 25; Mowrey v. Indianapolis & Cincinnati R. Co., 4 Biss. 78, Fed. Cas. No. 9,891; Stevens v. Rutland & Burlington R. Co., 29 Vt. 545; Black v. Delaware & Raritan Canal Co., 24 N. J. Eq. 455.

[330] Zabriskie v. Hackensack & New York R. Co., 18 N. J. Eq. 185, 90 Am. Dec. 617; Lincoln & Kennebec Bank v. Richardson, 1 Me. 79, 10 Am. Dec. 34; Taggart v. Western Maryland R. Co., 24 Md. 564, 89 Am. Dec. 760; Mower v. Staples, 32 Minn. 284; Poughkeepsie & S. P. Plankroad Co. v. Griffin, 24 N. Y. 150; Fall River Iron Works Co. v. Old Colony & F. R. R. Co., 5 Allen (Mass.) 221; Agricultural Branch R. Co. v. Winchester, 13 Allen (Mass.) 29; Peoria

amendments which do not change the nature, purpose, or character of a corporation or its enterprise, but which are designed merely to enable it to conduct its authorized business with greater facility or more beneficially, are auxilliary to the original object, and therefore, when a person becomes a stockholder or member, he impliedly assents that such alterations or amendments may be made.[331]

In every private corporation, as we shall see hereafter, there is not only a contract between the corporation and the state, but there is also a contract between the members, or between the members and the corporation, and under the constitution of the United States, the state can no more impair the obligation of the latter than it can the obligation of the former.[332] It follows that, unless the power to amend or repeal a charter has been reserved by the legislature, it cannot constitutionally confer upon the majority of the members of the corporation power to bind the minority by accepting a fundamental amendment of the charter.[333] When the state, however, has reserved the power to amend or repeal a charter, it has the power to authorize a majority of the members to accept any amendment, if it provides for payment of just compensation for the shares of such members as may dissent.[334]

In order that acceptance of an act amending the charter of a corporation may be valid and binding upon the members of the corporation, a meeting should be held after notice to all the members.[335]

As we shall see more at length hereafter, when a majority of the members of a corporation accept an amendment which they have no power to accept, the minority may apply to a court of

& Rock Island R. Co. v. Preston, 35 Iowa, 115; Joy v. Jackson & M. Plankroad Co., 11 Mich. 155; Irvin v. Susquehanna & P. Turnpike Co., 2 Pen. & W. (Pa.) 466, 23 Am. Dec. 53; Curry v. Scott, 54 Pa. St. 270.

[331] Mower v. Staples, 32 Minn. 284.

[332] Post, § 271(f).

[333] New Orleans, Jackson & G. N. R. Co. v. Harris, 27 Miss. 517; Black v. Delaware & Raritan Canal Co., 24 N. J. Eq. 455.

[334] Black v. Delaware & Raritan Canal Co., 24 N. J. Eq. 455; Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167.

[335] Com. v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Brown v. Fairmount Gold & Silver Min. Co., 10 Phila. (Pa.) 32.

equity for an injunction.[336] Or if the amendment is one which the majority may accept, but as to which they cannot bind the minority, the amendment may be set up by dissenting members as a defense in an action on their subscriptions to the stock of the corporation, for the change releases them from liability thereon.[337]

(f) Estoppel to question amendment or acceptance thereof.—One who contracts with a corporation acting under an amended charter and by its amended name is estopped to set up the claim that the amendment was unconstitutional, or that the amended charter has not been properly accepted by the corporation.[338]

And, on the other hand, where a corporation contracts under the power conferred by an act amending its charter, and the stockholders acquiesce, both it and they are estopped to set up the invalidity of the amendment in an action arising out of the contract. For example, where a railroad company organized under a general law procured the passage of a special act amending its charter, and afterwards, without any objection on the part of its stockholders, entered into a contract under the powers conferred upon it by the special act, it was held that both the corporation and its stockholders were estopped to assert that the contracts were invalid on the ground that the special act was void.[339]

(g) Effect of amendment.—When the charter of a corporation is merely amended, and the amendment is accepted, the effect is not to destroy the old corporation and create a new one, but merely to change the constitution and powers of the old corporation; and it follows that the existing contract and property rights, and the existing obligations of the corporation, are not in any way affected.[340]

[336] Post, § 539.

[337] Post, § 482.

[338] Eppes v. Mississippi, Gainesville & T. R. Co., 35 Ala. 33; Fell v. McHenry, 42 Pa. St. 41. See post, § 84.

[339] Johnson v. Mercantile Trust & Deposit Co., 94 Ga. 324. See, also, Owen v. Purdy, 12 Ohio St. 73.

[340] Johnston v. Crawley, 25 Ga. 316, 71 Am. Dec. 173; Washington College v. Duke, 14 Iowa, 14. And see post, § 339(c).

As to change of name, see ante, § 55.

An act of the legislature giving

——**Grant of special charter to existing corporation.**—It has been held that when a corporation which has been formed under a general law is afterwards granted a charter by special act, and accepts the same, this does not constitute the creation of a new corporation, but is in effect nothing more than an amendment of the original charter; the new charter consisting of the special act, and so much of the general law as is not inconsistent therewith.[341] And the same principle has been applied to the grant of a new charter to a corporation existing under a special charter.[342]

——**Burdens imposed.**—When a corporation accepts an act amending its charter, it must take the act as a whole, including its burdens as well as its benefits; and this is just as true of an acceptance implied from the conduct of a corporation in taking advantage of the benefits conferred, as it is of an acceptance by a formal vote. If it accepts the benefits, it is bound by the whole act, and is therefore subject to the burdens imposed thereby.[343]

In accordance with this principle, it has been held that a provision in the charter of a railroad company that its stock should be exempt from all taxation except such as was imposed upon bank stock when the charter was granted was repealed by an amendatory act, accepted by the company, providing that its stock should at all times be subject to such tax as the legis-

an existing but unorganized corporation a new set of corporators to organize and set it in operation, in place of those originally named, and who have neglected their duty, and making such modification of the corporate enterprise as in its opinion the public interests require, but not such as to radically change the character of the enterprise, does not create a new corporation. Ames v. Lake Superior & Mississippi R. Co., 21 Minn. 241.

[341] Johnston v. Crawley, 25 Ga. 316, 71 Am. Dec. 173.

But see, for cases in which it was held that a new corporation was created by a particular statute, Snook v. Georgia Imp. Co., 83 Ga. 61; Youngblood v. Georgia Imp. Co., 83 Ga. 797.

[342] Woodkork v. Union Bank of Tennessee, 3 Cold. (Tenn.) 488. Compare, however, Carlisle v. Terre Haute & Richmond R. Co., 6 Ind. 316.

[343] Kenton County Court v. Bank Lick Turnpike Co., 10 Bush. (Ky.) 529; Madison, W. & M. Plankroad Co. v. Reynolds, 3 Wis. 287 (where it was held that a corporation availing itself of a provision for the change of its name in an act amending its charter is bound by all the other provisions in the act altering its charter).

lature might impose.[344] And in an Ohio case, where a general law authorized any railroad company organized in pursuance of law to lease or purchase connecting lines constructed by other companies, and provided that all companies then incorporated and actually doing business might accept any of the provisions of the act, it was held that a railroad company leasing its road to another company, or taking a lease of another company's road, thereby accepted the provisions of the statute, and relinquished all rights under its charter inconsistent with such provisions, including the right to demand and take specified rates of fare, free from legislative control or alteration.[345]

§ 58. Extension and revival of charters—(a) In general.—A charter which is about to expire, or which has expired, may be extended or revived by a special act of the legislature, or under general laws, in the absence of constitutional restrictions; and the effect is not to create a new and distinct corporation, but merely to continue the existence of the old corporation unless a contrary intention appears.

Though a corporation, unless the period for which it may exist is limited by statute, has the capacity of perpetual succession, the period for which corporations may exist is now very generally limited by the special or general laws by or under which they are created; and by the weight of authority, after the expiration of the prescribed time, a corporation is dissolved, and ceases to exist for any purpose, unless some provision is made by the legislature for an extension of its charter.[346] Since corporations can be created by or under legislative authority only, it is only by or under such authority that the charter of a corporation can be extended beyond the period for which it was created.

(b) Extension under general laws.—The general laws authorizing the formation of corporations for various purposes, and limiting, as they generally do, the period for which they shall exist, very often contain provisions under which the members

[344] Macon & Augusta R. Co. v. Goldsmith, 62 Ga. 463.

[345] Cincinnati, Hamilton & D. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729.

[346] Bradley v. Reppell, 133 Mo. 545, 1 Smith's Cas. 127; Sturges

of a corporation may take certain steps, and thereby extend the existence of the corporation for an additional period, and thus continue business without interruption or change.[347]

(c) Extension by special act.—In the absence of constitutional provision to the contrary, when the charter of a corporation is about to expire, or at any time before its expiration, the legislature may pass a special act extending its existence.[348]

Such an act does not create a new corporation, in contem-

v. Vanderbilt, 73 N. Y. 384. And see post, § 305.

[347] As to the Michigan statute, see Attorney General v. Perkins, 73 Mich. 303; Seneca Min. Co. v. Osmun, 82 Mich. 573; Ovid Elevator Co. v. Secretary of State, 90 Mich. 466.

In New Jersey, see Smith v. Eastward Wire Mfg. Co., 58 N. J. Eq. 331.

In California, under the provision of the Civil Code (section 287) that any corporation existing January 1, 1873, may by a vote of its directors continue its existence under the provisions of the Code, and shall thereby possess all the rights and powers of a corporation organized thereunder, it was held that, where a corporation organized prior to the adoption of the Code had afterwards continued its existence thereunder, it became a Code corporation, and might therefore extend the term of its existence beyond the period for which it was originally organized. People v. Pfister, 57 Cal. 532.

Where a corporation amended its articles, extending the period of its existence, at a time when it had no legal authority to make such an amendment, but after a statute was enacted conferring such authority, adopted amended articles, the preamble of which made no reference to the period of existence, the former article of amendment in reference thereto, however, being retained with the articles as last amended and filed, it was held that the amendment was sufficient to extend the period of the corporation's existence. People v. Green, 116 Mich. 505.

Under a statute allowing a corporation to amend its articles of association in any manner consistent with the provisions of the act under which it was organized, a corporation may, by amendment of its articles, continue its corporate existence beyond the time fixed by the original articles, provided the entire term does not exceed the term for which it might have been incorporated in the first instance. People v. Green, 116 Mich. 505.

[348] Foster v. Essex Bank, 16 Mass. 245, 8 Am. Dec. 135, 1 Cum. Cas. 464, 2 Smith's Cas. 608; Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372; Augusta & Summerville R. Co. v. City Council of Augusta, 100 Ga. 701.

A constitutional provision prohibiting the creation of a certain class of corporations, and providing that those already in existence shall continue, does not prevent the legislature from extending the charter of a corporation belonging to such class. People v. Marshall, 6 Ill. 672.

In Pennsylvania it was held that a constitutional provision that no law shall create, renew, or extend the charter of more than one corporation is not violated by a law conferring privileges on certain existing corporations, so long as no more than one new charter is granted, defunct charter revived, or existing charter continued beyond the time when it would otherwise expire.

plation of the law, but merely continues the existence of the corporation under its original charter, and therefore it does not in any way affect the identity of the corporation, or its property or contract rights or liabilities.[349] And since it does not create a new corporation, it is not within the constitutional prohibition against the creation of corporations by special act.[350] Nor, for the same reason, can the corporation claim the benefit of a statute enacted before its extension, granting privileges or immunities to such corporations as might be *afterwards* created.[351]

An act extending the charter of a corporation whose rights and franchises have, under legislative authority, been assigned to another company, should be construed as conferring the additional privilege upon either the corporation named in the act, if in existence, or upon any other company which has succeeded to its rights.[352]

If the legislature passes an unconstitutional act extending the charter of a corporation, the state may institute a proceeding in the nature of *quo warranto* to oust it from the exercise of powers under the act, but such a proceeding cannot be insti-

Cleveland, Painesville & A. R. Co. v. City of Erie, 27 Pa. St. 380.

Where, before the expiration of the original charter of a corporation, the legislature passes an act to continue the same in force upon certain conditions, and subject to certain restrictions, the acceptance of the act by the corporation makes the act its charter, and for the future its powers and privileges are limited by its provisions. Augusta & S. R. Co. v. City Council of Augusta, 100 Ga. 701.

[349] Lincoln & Kennebec Bank v. Richardson, 1 Me. 79, 10 Am. Dec. 34; National Exchange Bank v. Gay, 57 Conn. 224; Town of Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157; Frostburg Min. Co. v. Cumberland & Pennsylvania R. Co., 81 Md. 28.

Reincorporation, as we shall see, is generally different. Its effect is in most cases to create a new and distinct corporation, and not merely to continue the existence of the old corporation. See post, § 339.

In a South Carolina case, where, when the charter of a religious corporation was about to expire, due application for a renewal was made to the clerk, and, without fault on the part of the corporation, there was delay in granting the renewal, it was held that the renewal, when granted, related back so as to prevent a reverter of its property. St. Phillip's Church v. Zion Presbyterian Church, 23 S. C. 297.

[350] Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372.

[351] Frostburg Min. Co. v. Cumberland & Pennsylvania R. Co., 81 Md. 28.

[352] Washington, Alexandria & G. R. Co. v. Martin, 7 D. C. 120.

tuted until the expiration of the time limited by its original charter.[353]

(d) **Revival of charter.**—The power to create a corporation includes the power to revive a corporation, and the legislature therefore may revive and continue a charter which has expired, unless prevented by some constitutional prohibition.[354] It has been held that the effect of such an act is, in contemplation of law, not to create a new corporation, but merely to revive and continue the old one, just as in a case where a charter is extended before its expiration, but this cannot be so, if a contrary intention appears.[355]

(e) **Acceptance of extension or revival.**—An act of the legislature extending a charter, like an original charter,[356] and like any other amendment of a charter,[357] must be accepted before it can become operative. And this is true, whether the extending act is passed before or after expiration of the original charter.[358] The acceptance of the act, however, may be implied, as in the case of any other amendment.[359] Thus it may be implied from the bringing of an action in the name of the corporation after expiration of the original charter, and after passage of the reviving act.[360]

IV. Proof of Incorporation.

§ 59. In general.—Whenever the existence of a corporation is in issue in an action, it must be proved by the party alleging the

[353] State v. New Orleans Gaslight Co., 25 La. Ann. 398.

[354] See St. Joseph & Iowa R. Co. v. Shambaugh, 106 Mo. 557.

[355] Lincoln & Kennebec Bank v. Richardson, 1 Me. 79, 10 Am. Dec. 34; Town of Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157. Compare Supreme Lodge, Knights of Pythias, v. Weller, 93 Va. 605; post, § 339(d).

Revival of a charter must be distinguished from reincorporation, the effect of which is to create a new and distinct corporation. See post, § 339.

Where an act created a corporation for a limited period, and granted to it all property escheated to the state in a certain district, and, after expiration of its charter, an act was passed reviving and continuing the same for a certain time, it was held that on its revival the corporation became entitled to the escheated property, the same as before. Brown v. Chesterville Academy Soc., 3 Rich. Eq. (S. C.) 362.

[356] Ante, § 44.

[357] Ante, § 57(e).

[358] Lincoln & Kennebec Bank v. Richardson, 1 Me. 79, 10 Am. Dec. 34.

[359] Ante, §§ 44(f), 57(e).

[360] Lincoln & Kennebec Bank v. Richardson, 1 Me. 79, 10 Am. Dec. 34.

same. Under some circumstances it is necessary to prove the existence of a corporation de jure, while under other circumstances it is sufficient to prove the existence of a corporation de facto.

(1) To prove a corporation de jure it is necessary to show

(a) A valid special charter creating the corporation.

(b) An application therefor or acceptance thereof by the corporators.

(c) Organization, when required by the charter, and substantial performance of all conditions precedent, if any, prescribed therein.

(d) Or to show a valid general law authorizing the formation of the corporation.

(e) And an organization thereunder in substantial compliance with its terms, including the performance of conditions precedent.

(2) To prove a corporation de facto, it is necessary and sufficient, according to the weight of authority, to show

(a) A valid law creating or authorizing the formation of the corporation.

(b) An attempt in good faith to organize thereunder, when organization is required, as it always is in the case of general laws, and as it generally is also under special charters.

(c) A colorable or apparent compliance with such requirements of the law as are intended as conditions precedent.

(d) And the exercise of corporate powers, or user.

§ 60. Necessity to prove incorporation.

Whenever an action is brought by or against a corporation, the corporate existence of the plaintiff or defendant, as the case may be, must be alleged, and if it is denied or otherwise put in issue, it must be proved,[361] unless, as will hereafter be explained, there are circumstances operating as an estoppel.[362] And

[361] Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 1 Smith's Cas. 112; Mix v. National Bank of Bloomington, 91 Ill. 20, 33 Am. Rep. 44; Snider's Sons' Co. v. Troy, 91 Ala. 224, 24 Am. St. Rep. 887, 1 Smith's Cas. 104; Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, 1 Cum. Cas. 407; Lord v. Bigelow, 8 Vt. 445; and other cases cited in the sections following.

[362] Post, § 83 et seq.

when an action is brought by or against persons as individuals, and it is claimed that they are incorporated, and that the action should have been brought by or against the corporation, and the fact of incorporation is put in issue, it must be proved.[363] So, when proceedings are instituted against persons by the state, or by the attorney general on behalf of the state, to oust them from the exercise of corporate powers on the ground that they are not incorporated, they must allege and prove their corporate existence.[364] The same is true in any other case in which the existence of a corporation is a material fact in the case, and is properly put in issue by the pleadings.

As we shall see in a subsequent chapter, however, proof of corporate existence may be rendered unnecessary by admissions in the pleadings in an action, or by the appearance of an association sued as a corporation, etc.[365]

§ 61. What must be proved.

The facts necessary to be proved in order to establish corporate existence depend largely upon the nature and object of the particular proceeding, and upon the circumstances upon which it is based. In some cases it is necessary to prove a corporation *de jure;* while in others it is sufficient to prove a corporation *de facto;* and in others, by reason of facts operating as an estoppel to deny corporate existence, it is enough to show that the association was acting as a corporation, and it is not necessary to establish its existence as a corporation, either *de jure* or *de facto.*

De jure corporate existence.—In a direct proceeding by the

[363] Owen v. Shepard, 19 U. S. App. 336, 59 Fed. 746; Duke v. Taylor, 37 Fla. 64; Williams v. Hewitt, 47 La. Ann. 1076; Stout v. Zullck, 48 N. J. Law, 599, 1 Cum. Cas. 989; Vanneman v. Young, 52 N. J. Law, 403.

[364] People v. Selfridge, 52 Cal. 331, 1 Keener's Cas. 90; State v. Webb, 97 Ala. 111, 38 Am. St. Rep. 151; Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287; People v. Lowden (Cal.) 8 Pac. 66; State v. Critchett, 37 Minn. 13. And see post, § 95.

[365] First Nat. Bank of Crawfordsville v. Dovetail Body & Gear Co., 143 Ind. 534; Mud Creek Draining Co. v. State, 43 Ind. 236; Ward v. Minnesota & Northwestern R. Co., 119 Ill. 287; Black River Imp. Co. v. Holway, 85 Wis. 344; Rush v. Halcyon Steamboat Co., 84 N. C. 702; Western Union Tel. Co. v. Eyser, 2 Colo. 141. And see post, § 86.

state in the nature of *quo warranto* to oust persons from the exercise of corporate powers, on the ground that they are not legally incorporated, it is necessary for the defendants to allege in their answer that they are a corporation, and to sustain the allegation by proof that they are legally incorporated,—a corporation *de jure*;[366] and in order to show this they must prove a valid special act of incorporation or charter, an application therefor or acceptance thereof, and, when it is required by the act, an organization thereunder and substantial compliance with all conditions precedent; or they must show a valid general law authorizing them to form such a corporation as they claim to be, an organization thereunder in compliance with its terms, and a substantial compliance with all conditions precedent.[367]

According to some of the decisions, though not all, a *de jure* corporate existence must also be shown in condemnation proceedings by a corporation claiming the right to take private property under the power of eminent domain, and in some other cases.[368]

De facto corporate existence.—Generally, however, in an action by or against a corporation on a contract, in an action against individuals on a contract, in which they defend on the ground that they were a corporation, and contracted as such, in an action by a corporation to recover property, in actions by or against a corporation for a tort, and on indictments for offenses against corporations, and in other cases, it is only necessary to show a *de facto* corporate existence, as distinguished from a *de jure* corporate existence.[369]

[366] People v. Lowden (Cal.) 8 Pac. 66.

[367] People v. Selfridge, 52 Cal. 331, 1 Keener's Cas. 90; State v. Webb, 97 Ala. 111, 38 Am. St. Rep. 151; Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287; State v. Critchett, 37 Minn. 13. And see post, § 95.

[368] Atlantic & Ohio R. Co. v. Sullivant, 5 Ohio St. 276. Contra, Wellington & P. R. Co. v. Cashie & C. Railroad & Lumber Co., 114 N. C. 690. See post, § 81(i) et seq.

[369] Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989; Snider's Sons' Co. v. Troy, 91 Ala. 224, 24 Am. St. Rep. 887, 1 Smith's Cas. 104; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 1 Smith's Cas. 112; Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 1 Smith's Cas. 87; Eaton v. Aspinwall, 19 N. Y. 119, 2 Keener's Cas. 1937, 1 Cum. Cas. 975;

And according to the weight of authority, as we shall see at some length in another chapter, all that is necessary in order to prove a *de facto* corporate existence is to show a valid law[370] under which such a corporation might have been organized, a *bona fide* attempt to organize under the law, a colorable, although not a substantial, compliance with the provisions of the law, and the exercise of corporate powers thereunder.[371]

Estoppel to deny corporate existence.—By the weight of authority, as we shall see at some length in a subsequent chapter, if an association assumes to act as a corporation, even without any authority at all from the legislature, a person who recognizes its existence as a corporation by contracting or otherwise dealing with it as such is estopped to deny its incorporation in an action based upon such contract or dealing, whether the action is brought by the association as a corporation against him, or by him against the association to charge them as partners.[372] And in like manner, persons who hold themselves out as a corporate body, and contract or otherwise deal in that capacity, are estopped to deny their incorporation in an action against them as a corporation based upon such contract or dealing.[373]

In such cases, the estoppel renders it unnecessary, according to the weight of authority, to prove either a *de jure* or *de facto* corporate existence. It is only necessary to prove that the as-

United States Vinegar Co. v. Schlegel, 143 N. Y. 537; Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113; Gibbs' Estate, 157 Pa. St. 59, 1 Keener's Cas. 3. And see post, § 81.

[370] Some courts, as we shall see, hold that a valid law is not essential to the existence of a corporation de facto. See post, § 82(c).

[371] See the cases above cited. And see Society Perun v. City of Cleveland, 43 Ohio St. 481, 1 Smith's Cas. 120, 2 Keener's Cas. 1953; Evenson v. Ellingson, 67 Wis. 634; Holmes v. Gilliland, 41 Barb. (N. Y.) 568; Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539; Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, 1 Cum. Cas. 407. See, also, post, § 82.

[372] Snider's Sons' Co. v. Troy, 91 Ala. 224, 24 Am. St. Rep. 887, 1 Smith's Cas. 104; Gartside Coal Co. v. Maxwell, 22 Fed. 197; Andes v. Ely, 158 U. S. 312; Butchers' & Drovers' Bank v. McDonald, 130 Mass. 264, 1 Cum. Cas. 420; Whitford v. Laidler, 94 N. Y. 145, 46 Am. Rep. 131; Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764. And see post, § 84.

[373] Independent Order of Mutual Aid v. Paine, 122 Ill. 625; Georgia Ice Co. v. Porter, 70 Ga. 637; Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282, 1 Smith's Cas. 138. And see post, § 87.

sociation was acting as a corporation, and that it dealt or was dealt with as such.[374]

§ 62. Burden of proof.

The burden of proving the existence of a corporation *de jure* or *de facto,* according to the circumstances, is upon the party who alleges it, though, as we shall see in the sections following, the burden will sometimes be sustained by proof of facts from which incorporation may be presumed. Thus, in *quo warranto* proceedings by the state to oust persons from the exercise of corporate powers, on the ground that they are not legally incorporated, the burden is upon the defendants to show legal incorporation.[375] Where persons doing business under a company name are sued individually as partners, and they deny individual liability, averring that they were incorporated, and that the contract was made by the corporation, the burden is upon them to prove their incorporation, or to show an estoppel to deny incorporation.[376] And when an association sues as a corporation, and its incorporation is denied, it has the burden of proving its corporate existence.[377]

§ 63. Presumptions and prima facie proof.

Proof of certain facts may often raise a presumption of due incorporation, which, in the absence of evidence tending to show want of incorporation, will make out a *prima facie* case. For example, it has repeatedly been held that if it is shown that an association has exercised corporate powers for a long period of time under a claim of corporate existence, the grant of a char-

[374] See the cases cited above. And see Ramsey v. Peoria Marine & Fire Ins. Co., 55 Ill. 311; Black River & Utica R. Co. v. Clarke, 25 N. Y. 208. See, also, post, §§ 88-92 et seq., and cases there cited.

[375] People v. Lowden (Cal.) 8 Pac. 66. See post, § 95.

[376] Owen v. Shepard, 19 U. S. App. 336, 59 Fed. 746; Williams v. Hewitt, 47 La. Ann. 1076; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416. See post, §§ 78, 81(b).

[377] Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, 1 Cum. Cas. 407; Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539; Lord v. Bigelow, 8 Vt. 445.

ter will be presumed, in the absence of evidence to the contrary.[378]

Incorporation will not be presumed, however, from acts, or from a mode of conducting business, which might just as well have been done or adopted by an unincorporated association as by a corporation.[379] Thus, the fact that the business of an association was conducted, or contracts made, by a president and secretary, raises no presumption of incorporation, for an unincorporated association may appoint a president and secretary.[380] And the corporate existence of a church is not shown by proof that the members held the ordinary meetings of a religious society, and elected officers, for these acts are entirely consistent with the existence of an unincorporated association.[381]

Some courts have held that there is no presumption of incorporation from the fact that an association has used a name appropriate to a corporate body,[382] while other courts have held that the use of a name which ordinarily imports a corporate existence is *prima facie* evidence of incorporation.[383]

§ 64. Parol evidence of incorporation—Reputation.

As we shall see in the sections following, facts necessary to

[378] Crafts of Mercers v. Hart, 1 Car. & P. 113; Kingston upon Hull v. Horner, 1 Cowp. 102; Sasser v. State, 13 Ohio, 453; United States v. Amedy, 11 Wheat. (U. S.) 392; Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; Trott v. Warren, 11 Me. 227; Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Robie v. Sedgwick, 35 Barb. (N. Y.) 319; Hager's Town Turnpike Road Co. v. Creeger, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495; Methodist Episcopal Society of Shelburne v. Lake, 51 Vt. 353; Rose Hill & Evanston Road Co. v. People, 115 Ill. 133; Ricketson v. Galligan, 89 Wis. 394; All Saints' Church v. Lovett, 1 Hall (N. Y.) 191. See, also, ante, § 37(c).

[379] Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; Clark v. Jones, 87 Ala. 474; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416. And see ante, § 44(f).

[380] Clark v. Jones, 87 Ala. 474; Duke v. Taylor, 37 Fla. 64.

[381] Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476.

[382] Briggs v. McCullough, 36 Cal. 542, 550; Duke v. Taylor, 37 Fla. 64.

[383] Stoutimore v. Clark, 70 Mo. 471, 1 Smith's Cas. 142; Jones v. Cincinnati Type Foundry Co., 14 Ind. 89, 1 Smith's Cas. 140; Platte Valley Bank v. Harding, 1 Neb. 461; Stein v. Indianapolis Bldg., Loan Fund & Sav. Ass'n, 18 Ind. 237, 81 Am. Dec. 353; Williamsburg City Fire Ins. Co. v. Frothingham, 122 Mass. 391. See, also, ante, § 44(f); post, § 92.

This rule does not apply, however, where it appears that the association has always acted as a partnership, and has not acted as a corporation. Jones v. Cincinnati Type Foundry Co., 14 Ind. 89, 1 Smith's Cas. 140.

be shown in order to establish corporate existence may be proved by parol evidence, if better evidence is not available.[384] And parol evidence may be both competent and sufficient to prove incorporation, if no objection or exception is taken to its admission.[385]

By the weight of authority, as we have seen, when an association contracts with a person as a corporation, it is estopped to deny its incorporation in an action on the contract; and if a person contracts with an association as a corporation, he is estopped to deny its incorporation in an action by it as a corporation on the contract, or in an action by him against the associates as partners.[386] It follows that in such cases it is only necessary to prove by parol evidence or reputation that the association was acting as a corporation, and was dealt with as such, for incorporation in fact need not be proved.[387]

In criminal prosecutions for offenses alleged to have been committed against the property of a corporation, some of the courts have held that it is only necessary to show the existence of the alleged corporation by parol evidence, or by reputation.[388] But there are some decisions to the contrary.[389]

As a general rule, when it is necessary to prove the existence of a corporation in a civil action, parol evidence is not compe-

[384] See Rose Hill & Evanston Road Co. v. People, 115 Ill. 133; Weber v. Fickey, 52 Md. 500. And see the sections following.

[385] Doyle v. Frank Douglas Machinery Co., 73 Ill. 273.

[386] Ante, § 60.

[387] Roberts v. National Ice Co., 6 Daly (N. Y.) 426; Woodson v. Bank of Gallipolis, 4 B. Mon. (Ky.) 203; Franz v. Teutonia Bldg. Ass'n, 24 Md. 259; Walker Paint Co. v. Ruggles, 48 Ill. App. 406; Rockville & W. Turnpike Road v. Van Ness, 2 Cranch, C. C. 449, Fed. Cas. No. 11,986; French v. Donohue, 29 Minn. 111; United States Vinegar Co. v. Schlegel, 143 N. Y. 537; Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764.

[388] Fleener v. State, 58 Ark. 98; People v. Ah Sam, 41 Cal. 645; Reed v. State, 15 Ohio, 217; Norton v. State, 74 Ind. 337; State v. Habib, 18 R. I. 558.

There is an express statutory provision in Missouri allowing such proof. State v. Jackson, 90 Mo. 156; State v. Cheek, 63 Mo. 364.

In proving de facto corporate existence by parol, the proof must be of reputation, and not by the direct statement of the witness. A witness cannot testify that a certain bank is a corporation. People v. Dole, 122 Cal. 486.

[389] In Trice v. State, 2 Head (Tenn.) 591, which was a prosecution for having possession of a counterfeit bank note, it was held that parol evidence was not admissible to prove the corporate

tent for that purpose, if objected to, when better evidence exists and can be produced by the party.[390] Thus, the articles or certificates of association or incorporation, or a duly-certified or authenticated copy thereof, are the best evidence of their execution or issuance and of their contents, and failure to produce them must be accounted for before the admission of parol evidence of their existence and contents.[391] If they have been lost or destroyed, parol evidence is admissible.[392]

§ 65. Proof and judicial notice of special charters and general laws—Public acts.

If the act of the legislature granting a special charter is a public, as distinguished from a private, law, no proof thereof is necessary in the courts of the state, for the courts must take judicial notice of all public laws.[393] A charter will be judi-

existence of the alleged bank, but that it was necessary to introduce the written memorandum required by the statute to be made and filed as a condition precedent to corporate existence, or a certified copy thereof. See, also, State v. Murphy, 17 R. I. 698.

[390] Owen v. Shepard, 19 U. S. App. 336, 59 Fed. 746; Warner v. Daniels, 1 Woodb. & M. 90, Fed. Cas. No. 17,181; Hallett v. Harrower, 33 Barb. (N. Y.) 537; Nicoll v. Clark, 13 Misc. Rep. (N. Y.) 128; A. Gauthier Decorating Co. v. Ham, 3 Colo. App. 559.

[391] Owen v. Shepard, 19 U. S. App. 336, 59 Fed. 746; Bell v. Dowdy, 13 Ky. Law Rep. 543; Hallett v. Harrower, 33 Barb. (N. Y.) 537.

[392] Rose Hill & Evanston Road Co. v. People, 115 Ill. 133.

[393] Hays v. Northwestern Bank of Virginia, 9 Grat. (Va.) 127; Stribbling v. Bank of the Valley, 5 Rand. (Va.) 132, 138; Bank of Utica v. Magher, 18 Johns. (N. Y.) 341, 345; City Council of Montgomery v. Wright, 72 Ala. 411; Beasley v. Town of Beckley, 28 W. Va. 81, 86; Hammett v. Little Rock & Napoleon R. Co., 20 Ark. 204; McKiel v. Real Estate Bank, 4 Ark. 592; Parker v. Carolina Sav. Bank, 53 S. C. 583; Williams v. Union Bank, 2 Humph. (Tenn.) 339; Trice v. State, 2 Head. (Tenn.) 591; Buell v. Warner, 33 Vt. 570; Towson v. Havre-de-Grace Bank, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; State v. Greenwell, 4 Gill & J. (Md.) 407; Russell v. Branhan, 8 Blackf. (Ind.) 277.

As to the distinction between public and private acts, see Stribbling v. Bank of the Valley, 5 Rand. (Va.) 132, 138.

If the legislature expressly declares an act to be a public act, it must be judicially noticed. Brookville Ins. Co. v. Records, 5 Blackf. (Ind.) 170; Hammett v. Little Rock & Napoleon R. Co., 20 Ark. 204; Covington Drawbridge Co. v. Shepherd, 20 How. (U. S.) 227; Herod v. Rodman, 16 Ind. 241; Eel River Draining Ass'n v. Topp, 16 Ind. 242.

In some states the constitution declares that every statute shall be deemed public, unless otherwise declared in the statute itself, and in these states all statutes not declared to be private must be judicially noticed.

In Massachusetts, a statute de-

cially noticed as a public law, if it has been recognized in a public law, as in a law extending it, or a law extending the powers of the corporation, etc.[394] The general incorporation laws now in force in the different states, authorizing the formation of corporations, are public laws which must be judicially noticed.[395]

Private and foreign acts.—The courts do not take judicial notice of private acts of the legislature, and therefore, if a corporation is created by a private act, its charter must be proved by introducing competent evidence of the act.[396]

Nor do the courts of a state, unless required by statute to do so, take judicial notice of foreign laws, and the laws of a sister state are foreign, within this rule. It is necessary, therefore, in order to prove the charter of a foreign corporation, to prove the act by or under which it was created.[397] It must be

clares that all acts of incorporation shall be deemed public acts, and be judicially noticed. See Boynton v. Middlesex Mut. Fire Ins. Co., 4 Metc. (Mass.) 212.

And so of bank charters in Georgia. Davis v. Bank of Fulton, 31 Ga. 69; Terry v. Merchants' & Planters' Bank of Savannah, 66 Ga. 177.

That a charter of a private corporation may be a public law, although not expressly declared to be so, because of the public character of its undertaking, see State v. Vincennes University, 5 Ind. 77; Russell v. Branham, 8 Blackf. (Ind.) 277; McKiel v. Real Estate Bank, 4 Ark. 592; Towson v. Havre-de-Grace Bank, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; Hammett v. Little Rock & Napoleon R. Co., 20 Ark. 204.

[394] Stribbling v. Bank of the Valley, 5 Rand. (Va.) 132, 139; Bank of Utica v. Magher, 18 Johns. (N. Y.) 341, 345; Beaty v. Knowler's Lessee, 4 Pet. (U. S.) 152, 167; Young v. Bank of Alexandria, 4 Cranch (U. S.) 384, 388.

[395] Dutchess Cotton Manufactory v. Davis, 14 Johns. (N. Y.) 238, 245, 7 Am. Dec. 459; Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, 1 Cum. Cas. 407.

[396] Ohio & Indianapolis R. Co. v. Ridge, 5 Blackf. (Ind.) 78; Bailey v. Lincoln Academy, 12 Mo. 174; Haven v. New Hampshire Insane Asylum, 13 N. H. 532, 38 Am. Dec. 512; Timlow v. Philadelphia & Reading R. Co., 99 Pa. St. 284; First Nat. Bank of Clarion v. Gruber, 87 Pa. St. 468; City Council of Montgomery v. Montgomery & W. Plank-Road Co., 31 Ala. 76; Agnew v. Bank of Gettysburg, 2 Har. & G. (Md.) 478; Holloway v. Memphis, El Paso & P. R. Co., 23 Tex. 465, 467, 76 Am. Dec. 68; Goshen & S. Turnpike Co. v. Sears, 7 Conn. 86; Williams v. Sherman, 7 Wend. (N. Y.) 109; Carrow v. Washington Toll Bridge Co., Phil. (N. C.) 118.

Contra by statute, in Kentucky, Collier v. Baptist Education Soc., 8 B. Mon. (Ky.) 68.

[397] Chapman v. Colby Bros. & Co., 47 Mich. 46; Holloway v. Memphis, El Paso & P. R. Co., 23 Tex. 465, 467, 76 Am. Dec. 68; Lewis v. Bank of Kentucky, 12 Ohio, 132, 40 Am. Dec. 469; Gaines v. Bank of Mississippi, 12 Ark. 769; Chesa-

proved by the production of a copy of the act, authenticated as required by the act of congress relating to the authentication of records to be used in the courts of other states, or by the production of a sworn copy.[398]

§ 66. Acceptance of charter.

It is not necessary that the acceptance of a charter by the corporators shall be proved by, or appear upon, the books or records of the corporation.[399] It may be so proved, if it appears thereon, and they are properly identified and authenticated;[400] and it has been held that, if it does so appear, the books or records are the best evidence of the fact, and they must be produced, if it is within the power of the party to do so.[401] But if he cannot do so, or if the fact of acceptance does not appear thereon, it may be proved by parol evidence of a formal vote of acceptance, or by evidence of the exercise of corporate powers under the charter, from which an acceptance may be inferred.[402]

peake & Ohio Canal Co. v. Baltimore & Ohio R. Co., 4 Gill & J. (Md.) 1, 63; Owen v. State, 5 Sneed (Tenn.) 493; Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87; State v. Carr, 5 N. H. 367; Stone v. State, 20 N. J. Law, 401; United States Bank v. Stearns, 15 Wend. (N. Y.) 314; Hammett v. Little Rock & Napoleon R. Co., 20 Ark. 204, 207.

It is otherwise by express statutory provision in some states. See Singer Mfg. Co. v. Bennett, 28 W. Va. 16, 22.

[398] Stone v. State, 20 N. J. Law, 401. See, also, United States Bank v. Stearns, 15 Wend. (N. Y.) 314; State v. Carr, 5 N. H. 367, 369; United States v. Johns, 4 Dall. (U. S.) 412, 1 Wash. C. C. 363, Fed. Cas. No. 15,481.

A copy of an act of incorporation is duly authenticated by affixing thereto the seal of the state, without other proof. United States v. Johns, 4 Dall. (U. S.) 412, 1 Wash. C. C. 363, Fed. Cas. No. 15,481.

In Wellersburg & W. N. Plankroad Co. v. Young, 12 Md. 476, letters patent from the governor of Pennsylvania, reciting the passage of an act creating a corporation, organization thereunder, and assumption of the powers conferred, was held sufficient evidence of incorporation to enable the corporation to sue a subscriber in Maryland.

[399] Ante, § 44(f).

[400] Coffin v. Collins, 17 Me. 440; Hudson v. Carman, 41 Me. 84; Dows v. Naper, 91 Ill. 44; Golder v. Bressler, 105 Ill. 419.

[401] Coffin v. Collins, 17 Me. 440; Hudson v. Carman, 41 Me. 84.

[402] Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64; Dorsey Harvester Revolving Rake Co. v. Marsh, 6 Fish. Pat. Cas. 387, Fed. Cas. No. 4,014; Logan v. McAllister, 2 Del. Ch. 176; Ameriscoggin Bridge v. Bragg, 11 N. H. 102; Woods v. Banks, 14 N. H. 101; Hammond v. Straus, 53 Md. 1; Society of Middlesex Husbandmen & Manufacturers v. Davis, 3

Parol evidence or the corporate books and records are in like manner admissible to show the acceptance by the members of a corporation, by vote or otherwise, of an act amending its charter, unless there is some requirement in the charter or amendatory act excluding such evidence.[403]

In the absence of evidence to the contrary, the courts will presume acceptance of a charter, without any evidence at all of acceptance, if the charter is beneficial to the corporators.[404]

§ 67. Organization of corporation, and performance of conditions precedent.

(a) **Corporate books and records.**—Unless other evidence is required by the statute, the records and books of a corporation, when properly identified and authenticated, but not otherwise,[405] are competent evidence, *prima facie,* to prove the organization of the corporation, and performance of conditions precedent.[406] The minutes of the meetings of corporators for

Metc. (Mass.) 133; Sinking Fund Com'rs v. Northern Bank, 1 Metc. (Ky.) 174; McKay v. Beard, 20 S. C. 156; Gleaves v. Brick Church Turnpike Co., 1 Sneed (Tenn.) 491; Talladega Ins. Co. v. Landers, 43 Ala. 115; Sumrall v. Sun Mut. Ins. Co., 40 Mo. 27; State v. Habib, 18 R. I. 558; Owen v. Purdy, 12 Ohio St. 73. And see ante, § 44(f).

And the question whether there has been an acceptance or not is a question of fact for the jury. Hammond v. Straus, 53 Md. 1.

In Newton v. Carbery, 5 Cranch, C. C. 632, Fed. Cas. No. 10,190, it was held that a charter granted to certain persons therein named was to be presumed, prima facie, to have been granted at their instance, and to have been accepted by them, but that such presumption was rebutted by evidence that no proceedings were ever had under the charter, although seven years had elapsed since its date.

[403] City of Covington v. Covington & Cincinnati Bridge Co., 10 Bush (Ky.) 69; ante, § 57(e). And see the cases cited in the preceding notes.

[404] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; Taylor v. Newberne Com'rs, 2 Jones Eq. (N. C.) 141, 146; Astor v. New York Arcade Ry. Co., 48 Hun (N. Y.) 562, 568, 113 N. Y. 93; Bangor, Oldtown & M. R. Co. v. Smith, 47 Me. 34; City of Antonio v. Jones, 28 Tex. 19.

[405] Highland Turnpike Co. v. McKean, 10 Johns. (N. Y.) 154; Glenn v. Orr, 96 N. C. 413.

[406] Highland Turnpike Co. v. McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324; Glenn v. Liggett, 47 Fed. 472; Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194; McFarland v. Triton Ins. Co., 4 Denio (N. Y.) 392; Reynolds v. Myers, 51 Vt. 444; Vawter v. Franklin College, 53 Ind. 88; Coffin v. Collins, 47 Me. 440; Hudson v. Carman, 41 Me. 84; Duke v. Cahawba Nav. Co., 10 Ala. 82; Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894; Crump v.

the purpose of organizing a corporation are *prima facie* evidence of the proceedings at such meeting.[407]

(b) Articles, certificates, letters patent, etc.—The orgainzation and existence of a corporation organized under a general law may be proved, *prima facie,* by producing the original articles or memorandum of association or certificate of incorporation according to the particular statute, filed or recorded in the office of the secretary of state, or other office, as required by the statute, or by a duly-certified copy thereof, if the original cannot be produced,—as where it remains in the office, or is in the possession of the corporation, and it has failed to produce it on notice to do so.[408] Where copies are not made competent evidence by statute, the originals are the best evidence.[409] Let-

United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; People v. Oakland County Bank, 1 Doug. (Mich.) 282; Foster v. White Cloud City Co., 32 Mo. 505; Glenn v. Orr, 96 N. C. 413. See Culver v. Third Nat. Bank of Chicago, 64 Ill. 528.

"The general rule is, (and it is a rule of evidence essential to public conveniences), that corporation books are evidence of the proceedings of the corporation, but then it must appear that they are the corporation books, and that they have been kept as such, and the entries made by the proper officer, or some other person in his necessary absence." Highland Turnpike Co. v. McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324.

[407] Ryder v. Alton & Sangamon R. Co., 13 Ill. 516; Vawter v. Franklin College, 53 Ind. 88; Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; Glenn v. Orr, 96 N. C. 413; Sweney v. Talcott, 85 Iowa, 103.

[408] Chamberlain v. Huguenot Mfg. Co., 118 Mass. 532; Fresno Canal & Irr. Co. v. Warner, 72 Cal. 379; Spring Valley Water Works v. City of San Francisco, 22 Cal. 434; Hall v. Carey, 5 Ga. 239; Fortin v. United States Wind Engine & Pump Co., 48 Ill. 451; Jewell v. Rock River Paper Co., 101 Ill. 57; Smith v. Mayfield, 60 Ill. App. 266; Heaston v. Cincinnati & Ft. Wayne R. Co., 16 Ind. 275; Walker v. Shelbyville & R. Turnpike Co., 80 Ind. 452; Washer v. Allensville, C. S. & V. Turnpike Co., 81 Ind. 78; Laflin & Rand Powder Co. v. Sinsheimer, 46 Md. 315; Thomas v. Walnut Land & Coal Co., 43 Mo. App. 653.

The delivery of articles of association to the officer by whom they are required to be filed may be proved by other evidence than his indorsement. Johnson v. Crawfordsville, F. K. & Ft. W. R. Co., 11 Ind. 280.

[409] Evans v. Southern Turnpike Co., 18 Ind. 101. As to such statutes, see post, § 69.

Certified copies of certificates filed in compliance with the law in the office of the secretary of state, or other office, on the organization of a corporation, in connection with proof of corporate acts, are competent evidence to prove organization of the corporation, in an action against it, after notice to it to produce its book of records, and its failure to do so. Dooley v. Cheshire Glass Co., 15 Gray (Mass.) 494.

When a corporation refuses, on notice, to produce the certificate of its organization, office copies

ters patent of incorporation, apparently issued by authority and under seal of the state, are *prima facie* proof of due incorporation.[410]

(c) **National banks.**—A certificate of the comptroller of the currency that an association has complied with the act of congress authorizing the incorporation of national banks, and that it is authorized to do business, and proof that it has in fact been doing business as a national bank, is *prima facie* proof of its corporate existence.[411]

(d) **Confirmatory act.**—An act of the legislature ratifying and confirming the organization of a corporation originally made under an act of incorporation or a general law, and expressly declaring it to be a legal corporation, is competent and sufficient evidence of its corporate existence.[412] The same is true of an act impliedly ratifying the organization of a corporation by recognizing it as a legally existing body.[413]

(e) **Affidavits—Parol evidence.**—Organization of a corporation cannot be proved by an *ex parte* affidavit.[414] Nor is it

of the same are admissible. Chamberlain v. Huguenot Mfg. Co., 118 Mass. 532.

In Jackson v. Leggett, 7 Wend. (N. Y.) 377, it was held that the record of a certificate of incorporation was not evidence of incorporation, where nonproduction of the certificate itself was not accounted for.

In an action by a turnpike company, it was held that the appointment of inspectors by the governor, and the certificate of the inspectors that the road was completed, and that gates were erected, was not sufficient evidence of corporate existence. Bill v. Fourth Great Western Turnpike Co., 14 Johns. (N. Y.) 416.

A certificate of a particular officer or judge that the provisions of an incorporation law have been complied with is no evidence of that fact, if the statute gives him no authority to determine the question. Boyce v. Towsontown Station of M. E. Church, 46 Md. 359, 1 Smith's Cas. 146.

In many states, statutes make a copy of a certificate, duly certified, primary evidence. See post, § 69.

[410] Dorsey Harvester Revolving Rake Co. v. Marsh, 6 Fish. Pat. Cas. 387, Fed. Cas. No. 4,014.

[411] Mix v. Bloomington Nat. Bank, 91 Ill. 20.

And see, Washington County Nat. Bank v. Lee, 112 Mass. 521; Tapley v. Martin, 116 Mass. 275; Merchants' Nat. Bank of Bangor v. Glendon Co., 120 Mass. 97; First Nat. Bank of Memphis v. Kidd, 20 Minn. 234; Merchants' Exchange Nat. Bank of Memphis v. Cardozo, 3 Jones & S. (N. Y.)

[412] Boykin v. State, 96 Ala. 16. And see post, § 77.

[413] Williams v. Union Bank, 2 Humph. (Tenn.) 339. And see post, § 77.

[414] Bowyer's Adm'r v. Giles, F. & K. Turnpike Co., 9 Grat. (Va.) 109.

competent, unless there is no better evidence available, to prove the organization and existence of a corporation by the testimony of persons claiming to have organized it, that they complied with the law and received a charter.[415]

Parol evidence is admissible, however, when the better evidence has been destroyed, or for any other reason cannot be produced. Upon an information in the nature of *quo warranto* to oust an association from the exercise of corporate powers, it was held that, where the certificate of incorporation and the record thereof had been destroyed by fire, parol evidence was admissible to prove compliance with the law in organizing as a corporation, and to prove the contents of the certificate, and that it was not necessary that such evidence should be so minute as to permit of the reproduction of the certificate in all its details.[416]

(f) Presumptions.—When an association has assumed to organize as a corporation under a valid law, and has exercised corporate powers, it will be presumed, in the absence of evidence to the contrary, that all conditions precedent have been complied with in its organization, and that it has been legally incorporated.[417] Thus it will be presumed that the articles of as-

[415] Owen v. Shepard, 19 U. S. App. 336, 59 Fed. 746. See, also, Warner v. Daniels, 1 Woodb. & M. 90, Fed. Cas. No. 17,181; Hallett v. Harrower, 33 Barb. (N. Y.) 537; Nicoll v. Clark, 13 Misc. Rep. (N. Y.) 128; A. Gauthier Decorating Co. v. Ham, 3 Colo. App. 559; Bell v. Dowdy, 13 Ky. Law Rep. 543.

[416] Rose Hill & Evanston Road Co. v. People, 115 Ill. 133; Weber v. Fickey, 52 Md. 500.

[417] Busey v. Hooper, 35 Md. 15, 6 Am. Rep. 350; Keene v. Van Reuth, 48 Md. 184; Tar River Nav. Co. v. Neal, 3 Hawks (N. C.) 520; Bank of United States v. Lyman, 1 Blatchf. 297, Fed. Cas. No. 924, affirmed 12 How. (U. S.) 225; Society of Middlesex Husbandmen & Manufacturers v. Davis, 3 Metc. (Mass.) 133; Packard v. Old Colony R. Co., 168 Mass. 92; Memphis & St. F. Plank Road Co. v. Rives, 21 Ark. 302; Wood v. Wiley Construction Co., 56 Conn. 87; Bank of Manchester v. Allen, 11 Vt. 302; Bank of Monroe v. Gifford, 72 Iowa, 750; Sweney v. Talcott, 85 Iowa, 103; Lorillard v. Clyde, 86 N. Y. 384; Welch v. Importers' & Traders' Nat. Bank, 122 N. Y. 177; National Mut. Fire Ins. Co. v. Yeomans, 8 R. I. 35; Puget Sound & Chehalis R. Co. v. Ouellette, 7 Wash. 265; Hagerstown Turnpike Road Co. v. Creeger, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495. Compare, however, Chesapeake & Ohio R. Co. v. Pack, 6 W. Va. 397; Raccoon River Nav. Co. v. Eagle, 29 Ohio St. 238.

Where a charter provided that the persons named therein as corporators or subscribers to stock should be a corporation upon doing certain acts, and the exist-

sociation were duly recorded as required by the statute,[418] that they were duly published,[419] that notice of organization was given within the time prescribed by the statute,[420] that the requisite amount of stock was subscribed,[421] and that corporators or officers chosen were shareholders,[422] or citizens,[423] as required by the statute.

And generally to prove the existence of a corporation under a special charter, when its existence is in issue collaterally, it is sufficient, *prima facie,* to prove the charter and acts of user under the same.[424]

ence of the corporation de facto appeared, it was held that it would be presumed that it was organized immediately after the passage of the charter. Attorney General v. Chicago & Northwestern R. Co., 35 Wis. 425.

[418] Bank of Monroe v. Gifford, 72 Iowa, 750.

[419] Wood v. Wiley Construction Co., 56 Conn. 87.

[420] Bank of United States v. Lyman, 1 Blatchf. 297, Fed. Cas. No. 924, affirmed 12 How. (U. S.) 225.

[421] Ashtabula & New Lisbon R. Co. v. Smith, 15 Ohio St. 328.

[422] In Welch v. Importers' & Traders' Nat. Bank, 122 N. Y. 177, under a statute which authorized the incorporation of manufacturing companies, and provided that "the stock, property and concerns of such company should be managed by not less than three, nor more than thirteen trustees, who shall respectively be stockholders in such company," where it appeared that two of the persons named in the certificate of incorporation as trustees for the first year were shareholders, and it did not appear that the third was not, and it was not alleged that the corporation was not legally organized, it was held that it must be assumed that its organization was legal.

[423] In a Kansas case, where corporators had signed and acknowledged their articles as "citizens" of a certain county in the state, and described themselves in the body thereof as "all of" such county, it was held that it should be presumed that they were citizens of Kansas, and, all else appearing regular, that the corporation was duly incorporated. Sword v. Wickersham, 29 Kan. 746.

[424] Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282, 1 Smith's Cas. 138; Com. v. Bakeman, 105 Mass. 53; Provident Institution for Savings v. Burnham, 128 Mass. 458; Gaines v. Bank of Mississippi, 12 Ark. 769; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; Came v. Brigham, 39 Me. 35; Merchants' Bank of St. Louis v. Harrison, 39 Mo. 433, 93 Am. Dec. 285; Utica Ins. Co. v. Cadwell, 3 Wend. (N. Y.) 296; Bank of Toledo v. International Bank, 21 N. Y. 542; Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Way v. Billings, 2 Mich. 397; Grays v. Lynchburg & S. Turnpike Co., 4 Rand (Va.) 578; Loomis v. Wainwright, 21 Vt. 520; Town of Mendota v. Thompson, 20 Ill. 197; Ramsey v. Peoria Marine & Fire Ins. Co., 55 Ill. 311; Peoria & P. U. Ry. Co. v. Peoria & F. Ry. Co., 105 Ill. 110; Hamilton v. President, etc., of Carthage, 24 Ill. 22; East St. Louis & C. Ry. Co. v. Belleville City Ry. Co., 159 Ill. 544; Wilmington & Manchester R. Co. v. Saunders, 3 Jones (N. C.) 126; St. Paul Fire & Marine Ins. Co. v. Allis, 24

(g) **Foreign corporations.**—The proper mode of proving the existence of a foreign corporation is to introduce proper evidence of the act by or under which it was created or organized,[425] and then, for the purpose of showing organization under the law, where an organization was necessary, to introduce the articles or certificate of incorporation, or the record or a copy thereof, authenticated in the mode prescribed by the laws of the state, or by section 906 of the Revised Statutes of the United States.[426] There are decisions, however, in which other proof has been held sufficient.[427]

Minn. 75; Henderson v. Mississippi Union Bank, 6 Smedes & M. (Miss.) 314; Bank of Manchester v. Allen, 11 Vt. 302.

[425] See ante, § 65.

[426] See Parchen v. Peck, 2 Mont. 567; Owen v. Shepard, 19 U. S. App. 336, 59 Fed. 746.

In West Virginia it is provided that "whenever in any case it becomes material to ascertain what the law, statutory or other, of another state or county or of the United States is, or was at any time, the court, judge or magistrate shall take judicial notice thereof and may consult any printed books purporting to contain, state or explain the same, and consider any information or argument that is offered on the subject." And it was held under this provision that a corporation created under a general law of New York might be proved in West Virginia by the production of a copy of the certificate of its incorporation, attested by the secretary of state of New York under the seal of his office, authenticated by the governor under the seal of the state, or by a copy of such certificate made by the clerk of the county in which the business of the corporation was carried on, under the seal of his office, and certified by the presiding justice of the supreme court of said county, and further authenticated by the clerk of such court under the seal of the court, the certificates and attestations being in the form prescribed by statute. Singer Mfg. Co. v. Bennett, 28 W. Va. 16, 22.

[427] In a Washington case it was held that under the statute of that state authorizing foreign corporations to do business in the state, and prescribing particular formalities to be observed as conditions precedent, the existence of a foreign corporation might be proved prima facie, in an action by or against it, by the introduction of a copy of its articles of incorporation and of the appointment of an agent in the state, certified by the secretary of state as being of record in his office. Knapp, Burrell & Co. v. Strand, 4 Wash. 686.

In a Texas case it was held that the existence of a corporation of another state may be proved prima facie by producing a copy of a general law authorizing the formation of such corporations, properly certified by the secretary of such state, under the seal of the state, to be a true copy of an enrolled law of the state, giving title and date of approval, and by producing a properly authenticated certificate of the organization of the company under the law. Western Electric Mfg. Co. v. Curtis, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 729.

In Bartlett v. Wilbur, 53 Md. 485, it was held that since a statute of New York provided that a certified copy of any certificate of incorporation filed in a particular public office should be re-

(h) Conclusiveness of certificates, etc.—Certificates of incorporation and other formal documents required to be filed or issued upon the organization of a corporation are not generally conclusive evidence of due organization unless made so by statute. It has been held, however, that if the charter of a corporation appoints commissioners, and directs them to ascertain and certify the performance of a condition precedent to incorporation,—such as the subscription of the amount of capital stock prescribed by the charter,—their certificates that the condition has been complied with, and that the corporation is duly organized, is conclusive as against every person except the state.[428]

ceived in all courts as prima facie evidence of the facts stated therein, such a copy was admissible in evidence in the courts of Maryland.

In a Michigan case, according to the syllabus, it was held that the fact of the corporate existence of a company might be found from the testimony of a witness that, from information derived from the company in doing business for them, and from an examination of what purported to be their articles of incorporation, it was an incorporated company under the laws of another state. Locke v. Leonard Silk Co., 37 Mich. 479. This decision, however, cannot be sustained if it was in fact to this effect. See Owen v. Shepard, 19 U. S. App. 336, 59 Fed. 746; State v. Murphy, 17 R. I. 698.

In Rafferty v. State, 91 Tenn. 655, it was held that a certificate of the state insurance commissioner attached to a pamphlet copy of the charter of incorporation of a foreign insurance company, that it had complied with the law and was authorized to transact business in the state, was sufficient proof of its incorporation in a criminal prosecution of a person insured by it for attempt to obtain money from it by false pretenses.

[428] Tar River Nav. Co. v. Neal, 3 Hawks (N. C.) 520.

Where the charter of a bank provided that a board of commissioners named therein should receive subscriptions to its capital stock, and apportion the same among the subscribers, holding a public meeting for the purpose, and certifying the result in a manner specially provided, it was held that the decision and certificate of the commissioners that the whole amount of stock had been legally taken was final on the question whether the bank was in that respect legally organized. Litchfield Bank v. Church, 29 Conn. 137.

In Dollbear v. American Bell Telephone Co., 126 U. S. 1, proof of a special act of incorporation of Massachusetts, authorizing persons to organize as a corporation, and a certificate of the secretary of the commonwealth in the form required by law, were held conclusive evidence of incorporation.

But where a clause in the charter of a navigation company authorized it to collect tolls as soon as the governor, after receiving the certificate of certain commissioners to the effect that the river was in sufficient repair to entitle the company to take tolls, should proclaim its right to do so, it was held that such certificate and proclamation were not of themselves conclusive evidence of the organization of the company. Duke v. Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472.

§ 68. Proof of user.

User of corporate powers may be shown by proof that the association elected officers or held meetings as a corporate body, that it maintained an office, or that it transacted business in a way which imports that it was acting as a corporation.[429] "The proof of user," said Judge Felch in an early Michigan case, "must necessarily consist of evidence of the acts of the corporation, showing that they are doing business under their charter. Any acts tending to show this, are admissible for that purpose; as keeping open an office; having officers acting in the name, and as the agents of the company, etc. The receiving of applications and issuing policies of insurance—in other words, doing the very business, and in the very manner pointed out by the statute, and in the name of the corporation—would be direct evidence of user."[430]

User may be proved either by parol evidence of the exercise of corporate powers,[431] or by production of written instruments executed by the corporation, or its records and books showing corporate meetings, or other corporate acts.[432]

§ 69. Statutory provisions.

In many jurisdictions, the mode and sufficiency of proof of

[429] Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Ramsey v. Peoria Marine & Fire Ins. Co., 55 Ill. 311; Tipton Fire Co. v. Barnheisel, 92 Ind. 83; Sampson v. Bowdoinham Steam Mill Corp., 36 Me. 78; Utica Ins. Co. v. Tilman, 1 Wend. (N. Y.) 555; Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539; Merchants' Bank of St. Louis v. Harrison, 39 Mo. 433, 93 Am. Dec. 285; Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116. See, also, post, §§ 82(h), 92.

[430] Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 135, 43 Am. Dec. 457.

[431] Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 1 Smith's Cas. 87, 2 Keener's Cas. 1949; Whitford v. Laidler, 94 N. Y. 145, 46 Am. Rep. 131; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 185; Tipton Fire Co. v. Barnheisel, 92 Ind. 88; Lucas v. Bank of Georgia, 2 Stew. (Ala.) 147; Stone v. East Berkshire Congregational Soc., 14 Vt. 86, 90.

[432] Ryder v. Alton & Sangermon R. Co., 13 Ill. 516; Ramsey v. Peoria Marine & Fire Ins. Co., 55 Ill. 311; Reynolds v. Myers, 51 Vt. 444, 454; Narrangansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282, 1 Smith's Cas. 138; Provident Institution for Savings v. Burnham, 128 Mass. 458; Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; Anderson v. Kanawha Coal Co., 12 W. Va. 526, 537; Duke v. Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472; Highland Turnpike Co. v. McKean, 10 Johns.

incorporation has been made the subject of express statutory provision. For example, in Michigan there is a statute declaring that proof that a company is doing business under a certain name shall be *prima facie* proof of its due incorporation and existence pursuant to law, and of its name.[433] And in a number of states, statutes have been enacted making a duly-certified copy of the articles of association or certificate of incorporation filed in pursuance of the law creating or authorizing the formation of a corporation *prima facie* evidence of incorporation.[434] Such a statute, however, is not to be construed as impliedly excluding other evidence of corporate existence, which would be competent in the absence of the statute,[435] unless such an intention on the part of the legislature clearly appears.[436]

(N. Y.) 154, 6 Am. Dec. 324; Vawter v. Franklin College, 53 Ind. 88.

[433] Lake Superior Bldg. Co. v. Thompson, 32 Mich. 293; Canal St. Gravel Road Co. v. Paas, 95 Mich. 372.

It is not enough to prove acts—holding meetings and electing officers—which are entirely consistent with the existence of an unincorporated association. Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476.

[434] See Marshall v. Macon County Sav. Bank, 108 N. C. 639; New York Car Oil Co. v. Richmond, 6 Bosw. (N. Y.) 213, 19 How. Pr. 505; Spokane & Idaho Lumber Co. v. Loy, 21 Wash. 501; Squires v. Brown, 22 How. Pr. (N. Y.) 35; Weed Sewing Machine Co. v. Kaulback, 3 Thomp. & C. (N. Y.) 304; Rassbeck v. Desterreicher, 55 How. Pr. (N. Y.) 516.

In East St. Louis C. Ry. Co. v. Wabash, St. L. & P. Ry. Co., 24 Ill. App. 279 (reversed on other points in 123 Ill. 594), it was held under the statute of that state that a copy of the articles of consolidation of two corporations, duly certified under the seal of the secretary of state, was prima facie evidence of the existence of the consolidated corporation.

Under the Michigan statute making a copy of any articles of association filed pursuant to law, with the required affidavit annexed thereto, certified by the secretary of state to be a true copy, prima facie evidence of incorporation, etc., the fact that the certificate of the secretary of state calls the articles a "certificate" is immaterial. Canal St. Gravel Road Co. v. Paas, 95 Mich. 372.

[435] New York Car Oil Co. v. Richmond, 6 Bosw. (N. Y.) 213; Edelhoff v. State, 5 Wyo. 19, 23; State v. Shaw, 92 N. C. 768, 771; Glenn v. Orr, 96 N. C. 413. See, also, Green v. City of Indianapolis, 25 Ind. 490. Compare Hallett v. Harrower, 33 Barb. (N. Y.) 537.

The original record of incorporation is admissible to prove the fact of incorporation, as well as the letters of incorporation. State v. Abernathy, 94 N. C. 545.

[436] In Porter v. State, 141 Ind. 488, it was held that the admission of person questioning the validity of the organization of a corporation, that the original articles were filed in the county recorder's office, did not render it unnecessary to produce either such articles or the record thereof, or a certified copy, where a statute made such record or a certified copy conclusive evidence of the recitals therein.

In some states, a statute makes copies of all papers legally deposited in the office of the secretary of state, duly-certified by him and authenticated by the seal of his office, evidence in the same manner and with like effect as the originals, and this applies to certificates and other papers filed on the organization of a corporation.[437]

[437] Kern v. Chicago Co-Operative Brewing Ass'n, 40 Ill. App. 356.

CHAPTER IV.

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I. In General.

§ 70. General summary.—With respect to the effect of irregularities in the organization of or attempt to organize a corporation, and the effect of failure to incorporate, there is much conflict in the decisions. The following propositions, however, are sustained by the weight of authority:

(1) Failure of the corporators to comply substantially, in the organization of or attempt to organize a corporation, with any condition precedent prescribed by the statute under which the attempt to organize is made, will prevent the associates from acquiring corporate existence as against the state in a direct proceeding to oust them from the exercise of corporate powers, unless such failure is waived by the state.

(2) Such failure will also prevent the associates from acquiring corporate existence as against a collateral attack by the state, or by themselves, or by other private individuals, unless there is a de facto corporation, or unless there is an estoppel to deny incorporation, according to the rules which will be hereafter explained.

(3) Failure to comply with conditions subsequent prescribed by the statute may be ground for a direct proceeding by the state to oust the corporation from the right to exercise corporate powers, but it cannot prevent the associates from acquiring a corporate existence.

(4) Failure to comply with a provision which is merely directory does not prevent incorporation.

(5) Even as against the state, it is sufficient if requirements intended as conditions precedent are substantially complied with.

(6) Mere surplusage does not affect the validity of organization and incorporation.

(7) Failure to comply substantially with conditions precedent may be waived by the state.

(8) By the weight of authority, if there is a failure to incorporate either de jure or de facto, and there is no estoppel, persons who assume to act as officers of a pretended corporation are individually liable, or the members may be held liable as partners.

(9) By the weight of authority, however, if persons attempt in good faith to organize as a corporation, under a law authorizing them to incorporate, and comply colorably with the provisions of the law, and exercise corporate powers, there is a corporation de facto, and the legality of their incorporation can only be questioned by the state in a direct proceeding for that purpose.

(10) And, by the weight of authority, even when there is no de facto corporate existence, persons who hold themselves out as an incorporated association, and deal as such, and persons who deal with an association as a corporation, are estopped to deny its incorporation.

§ 71. Failure to comply with conditions precedent.—Failure of corporators to substantially comply with conditions precedent is fatal to the creation of a corporation which will be valid as against a direct attack by the state, but it is not necessarily fatal to the creation of a corporation which will be valid as against a collateral attack by the state or by private individuals.

Effect as against the state.—If the statute, whether general or special, authorizing the formation of a corporation, requires it to be organized in a certain way, or with certain formalities, compliance with such requirements by the corporation is ordinarily a condition precedent to the existence of a *de jure* corporation, or corporation that will be valid as against an attack

in *quo warranto* proceedings by the state, for the legislature, as we have seen, has the right to prescribe the conditions upon which it will grant a charter, and the charter, if accepted at all, must be accepted in accordance with its terms.[1]

As we shall presently see, a corporation *de facto,* or corporation which is valid as against every person but the state, and even as against the state in a collateral attack, may sometimes exist without an organization in compliance with all the mandatory provisions of the statute,[2] but an organization in substantial compliance with such requirements is always essential to the creation of a corporation *de jure,* and if there is a failure to substantially comply therewith, the state may institute *quo warranto* proceedings and oust the association from the exercise of corporate powers.[3]

Illustrations.—In a Michigan case, a statute provided that it should be lawful for any number of persons, not less than five, to organize a waterworks company "whenever" the common council of any city or incorporated village, or the municipal authority of any town in the state, should, by resolution, declare it to be expedient to have works constructed for the purpose of supplying such city, village, or town, and the inhabitants thereof, with water, but to be inexpedient for such city, town, or village to build such works under the power granted in its charter. It was held that such a resolution was a condition precedent to the right to organize a waterworks company under the statute, and in *quo warranto* proceedings by the state, an association attempted to be organized as a corporation under it, without such a resolution, was ousted from the exercise of corporate powers.[4]

So, as we have seen in treating of the organization of cor-

[1] Ante, § 44.

[2] Post, § 80 et seq.

[3] Attorney General v. Hanchett, 42 Mich. 436; Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287; State v. Critchett, 37 Minn. 13; People v. Chambers, 42 Cal. 201; People v. Stockton & Visalia R. Co., 45 Cal. 306, 13 Am. Rep. 178; People v. Selfridge, 52 Cal. 331, 1 Keener's Cas. 90; People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 1 Smith's Cas. 74; State v. Central Ohio Mut. Relief Ass'n, 29 Ohio St. 399; People v. Cheeseman, 7 Colo. 376.

[4] Attorney General v. Hanchett, 42 Mich. 436.

porations, a corporation is not lawfully created, if the corporators fail to prepare, subscribe, and acknowledge articles of association, or a certificate of association, substantially as required by the statute,[5] or if the certificate or articles are not substantially in the form prescribed by the statute,[6] or if they are not properly published or filed.[7] We have also seen that the organization of a proposed corporation by a less number of corporators than is required by the statute does not give them a lawful corporate existence.[8] And if the statute requires that all or part of the capital stock of the corporation shall be subscribed, or subscribed and paid in, before organization, the requirement must be complied with to give the corporation legal existence.[9]

Effect as against others than the state.—Some of the courts hold that *de jure* incorporation must be shown—that is, incorporation which is legal as against a direct attack by the state—in certain proceedings against private individuals, so that failure to comply with a condition precedent may be set up collaterally by them to defeat such proceedings. Thus it is held by some courts, though not by all, that this is the case where an alleged corporation seeks to condemn land under the power of eminent domain, or to assess and collect money under a statute for the benefits conferred upon individuals by the construction of its works, etc.[10]

[5] State v. Critchett, 37 Minn. 13; Utley v. Union Tool Co., 11 Gray (Mass.) 139, 1 Cum. Cas. 967; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977; ante, § 48(g).

[6] Montgomery v. Forbes, 148 Mass. 249, 1 Smith's Cas. 94, 2 Keener's Cas. 1945, 1 Cum. Cas. 69; Busenback v. Attica & B. Gravel Road Co., 43 Ind. 265; Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287; State v. Bethlehem & Z. Gravel Road Co., 32 Ind. 357; Piper v. Rhodes, 30 Ind. 309; ante, § 48(g).

[7] Clegg v. Hamilton & Wright County Grange Co., 61 Iowa, 121; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977; Bigelow v. Gregory, 73 Ill. 197; Slocum v. Head, 105 Wis. 431; ante, § 48(e), (j).

[8] State v. Critchett, 37 Minn. 13; Montgomery v. Forbes, 148 Mass. 249, 1 Smith's Cas. 94, 2 Keener's Cas. 1945, 1 Cum. Cas. 69; ante, § 46.

[9] People v. Chambers, 42 Cal. 201; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 246; ante, § 48(f); post, § 504.

[10] Post, § 81(i) et seq.

Generally, however, as we shall presently see at some length, as against a collateral attack upon the corporate existence of an association, it is only necessary to show that it is a corporation *de facto,* and, by the weight of authority, to show the existence of a corporation *de facto,* it is only necessary to show a *bona fide* attempt to organize as a corporation, under a law authorizing such a corporation, and a colorable or apparent compliance with the provisions of the law, followed by the exercise or user of corporate powers under the law.[11] If the failure to comply with conditions precedent is not such as to prevent the existence of a corporation *de facto,* such failure, as a general rule, cannot be set up collaterally either by the corporation itself, or by its members, or by third persons; but if the failure is such as to prevent the association from becoming a corporation *de facto,* its corporate existence may be collaterally attacked, either in an action by it, or in an action against its members or officers to charge them as individuals,[12] unless there is an estoppel in accordance with principles to be explained in subsequent sections.[13]

§ 72. Unauthorized purpose.

If it is attempted to organize a corporation for a purpose which is not within the purview of the statute under which the attempt is made, the state may certainly institute *quo warranto* proceedings and oust the association from the exercise of corporate powers.[14] And according to the better opinion, its existence as a corporation may also be collaterally attacked by in-

[11] Post, §§ 81, 82.

[12] Utley v. Union Tool Co., 11 Gray (Mass.) 139, 1 Cum. Cas. 967; Montgomery v. Forbes, 148 Mass. 249, 1 Smith's Cas. 94, 2 Keener's Cas. 1945, 1 Cum. Cas. 69; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939; Doyle v. Mizner, 42 Mich. 332; Walton v. Oliver, 49 Kan. 107, 33 Am. St. Rep. 355; Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151; Richmond Factory Ass'n v. Clarke, 61 Me. 351; Wilmington & Manchester R. Co. v. Wright, 5 Jones (N. C.) 304; Bigelow v. Gregory, 73 Ill. 197; Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652; Loverin v. McLaughlin, 161 Ill. 417; Fifth Baptist Church v. Baltimore & Potomac R. Co., 4 Mackey (D. C.) 43; State v. Bethlehem & Z. Gravel Road Co., 32 Ind. 357; McCallion v. Hibernia Sav. & Loan Soc., 70 Cal. 163; post, §§ 78, 81(b).

[13] Post, § 84.

[14] State v. Critchett, 37 Minn. 13.

dividuals, for there is not even a corporation *de facto*.[15] This is certainly so if the purpose for which a corporation is organized is not only unauthorized, but contrary to an express statutory prohibition, or contrary to public policy.[16]

§ 73. Failure to comply with conditions subsequent.—Failure to comply with conditions subsequent in a statute creating a corporation, or authorizing the formation of a corporation, cannot affect the validity of the organization of the corporation. It may give the state the right to institute quo warranto proceedings against the corporation to declare a forfeiture of its right to continue, but it cannot otherwise affect either its existence or validity.

There is a clear distinction, with respect to the organization of corporations, between such requirements of the statute as are intended as conditions precedent to the creation of a corporation, and such as are intended as conditions subsequent merely. Failure to comply substantially with the former will, as we have seen, prevent legal incorporation. Compliance with the latter, however, is not required in order to give the association corporate existence, but is required, after corporate existence has been acquired, to entitle it to legally continue and act as a corporation. If a corporation fails to comply with a condition subsequent, the state may institute proceedings to oust it from the right to exercise the powers and privileges conferred upon it,[17] but until such proceedings are instituted, and a judgment of forfeiture rendered, the existence of the association as a corporation is not in any way affected.[18]

[15] Vredenburg v. Behan, 33 La. Ann. 635; Foster v. Moulton, 35 Minn. 458; ante, § 47; post, § 82(c)(3).

[16] See ante, § 47(c); post, 82(c)(7).

[17] Post, § 314(d).

[18] Harrod v. Hamer, 32 Wis. 162; Cheraw & Chester R. Co. v. White, 14 S. C. 51, 1 Smith's Cas. 79; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344, 371; Cross v. Pinckneyville Mill Co., 17 Ill. 54; Hammond v. Straus, 53 Md. 1; Musgrave v. Morrison, 54 Md. 161; Connecticut & Passumpsic Rivers R. Co. v. Bailey, 24 Vt. 465, 57 Am. Dec. 181; St. Joseph & Iowa R. Co. v. Shambaugh, 106 Mo. 557, 567; Elizabethtown Gas Light Co. v. Green, 46 N. J. Eq. 118; Stokes v. Findlay, 4 McCrary, 205, Fed. Cas. No. 13,478; Southern Pac. R. Co. v. Orton, 32 Fed. 457; and cases cited specifically in the notes following. See, also, post, § 313(b).

"There is a broad and obvious distinction," it was said by Judge Cope in a California case, "between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter. The right of the plaintiff to be considered a corporation, and to exercise corporate powers, depends upon the fact of the performance of the particular acts named in the statute as essential to its corporate existence."[19]

Illustrations.—Whether a particular act required by the statute is a condition precedent, and therefore essential to the creation of a corporation, or merely a condition subsequent, depends entirely upon the intention of the legislature as shown by the language of the act and the purpose of the requirement. Thus, where a general law authorizing the formation of business corporations prescribed the mode in which such a corporation should be organized, and then declared that, "upon the completion of the organization of the company," the probate judge should issue a certificate of organization, it was held that the issuance of the certificate was not a condition precedent to incorporation, but a condition subsequent merely, since by the terms of the statute it was not to be issued until after *complete* organization.[20]

And where a general law provided that before any *corporation* organized thereunder should "commence business," the

[19] Mokelumne Hill & Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

[20] Sparks v. Woodstock Iron & Steele Co., 87 Ala. 294.

Where a special act of incorporation provided that, when the corporation should be created and organized under the act, a certificate of incorporation should be filed with the clerk of the circuit court of the county in which the corporation was to do business, and a duplicate with the secretary

president and directors should cause the articles of association to be published in the papers, make a certificate of the purposes of the corporation, the amount of the capital stock, the amount actually paid in, and the names of the stockholders and the number of shares held by each, and deposit the same with the secretary of state, and a duplicate with the clerk of the county in which the business was to be carried on, and imposed a penalty on the president and directors for failure to comply therewith, it was held that the making and filing of the certificate, etc., was not a condition precedent to the existence of a corporation organized thereunder, but merely a condition precedent to the right to commence business, and that no one but the state could object to a failure to comply therewith.[21]

So, where a special act created a railroad corporation in terms importing a present grant, and then provided that the directors named in the act should meet and organize, and open subscription books, and that the company should commence and complete the construction of its road within a certain time, it was held that these requirements were not conditions precedent to the creation of the corporation, and that corporate existence was acquired as soon as the act was accepted.[22]

of state, it was held that filing a certificate with the clerk was not a condition precedent to incorporation. Granby Mining & Smelting Co. v. Richards, 95 Mo. 106.

[21] Harrod v. Hamer, 32 Wis. 162. See, also, Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381; Augur Steel Axle & Gearing Co. v. Whittier, 117 Mass. 451; In re Shakopee Mfg. Co., 37 Minn. 91; Baker v. Backus' Adm'r, 32 Ill. 79, 97; Granby Mining & Smelting Co. v. Richards, 95 Mo. 106; Jhons v. People, 25 Mich. 499.

Where a statute declared that, when certain provisions should be complied with, an association organized thereunder should be a corporation, and then provided that, before any corporation so formed should commence business, the officers should cause the articles of association to be published, it was held that such publication was not a condition precedent. Holmes v. Gilliland, 41 Barb. (N. Y.) 568. Compare, however, Heinig v. Adams & Westlake Mfg. Co., 81 Ky. 300. And see ante, §§ 48(e), 71.

Where a statute authorizing the formation of corporations declared that an association should be a corporation after performing certain acts, and then provided that any corporation formed thereunder should have the power to declare in the articles of association the number of shares, not to exceed 1,000, of which the capital stock should consist, and the value of each share, etc., it was held that such a declaration was not a condition precedent. Lord v. Essex Bldg. Ass'n, No. 4, 37 Md. 320.

[22] St. Joseph & Iowa R. Co. v. Shambaugh, 106 Mo. 557, 567.

Where the charter of a railroad company conferred corporate pow-

On the other hand, where a general law authorizing the formation of corporations required that the articles of association should be filed in the recorder's office, and a copy with the secretary of state, and declared that corporate existence should date from such filing, the filing of a copy of the articles themselves with the secretary of state, as well as the filing of the articles in the recorder's office, was held a condition precedent to incorporation.[23] Where a statute required a certificate of incorporation to be filed in the office of the clerk of the county in which the proposed corporation was to do business, and a duplicate in the office of the secretary of state, and provided that, "when the certificate" should be "filed as aforesaid," the persons executing the same and their successors should be a corporation, it was held that filing the certificate in the county clerk's office was a condition precedent, but filing a duplicate with the secretary of state was merely a condition subsequent.[24]

Other decisions will be found in the note below.[25]

ers in terms importing an immediate grant, with a proviso that operations on its road should be commenced within a certain time, it was held that the requirements of the proviso were not conditions precedent to incorporation. Cheraw & Chester R. Co. v. White, 14 S. C. 51, 1 Smith's Cas. 79. See, also, Toledo & Ann Arbor R. Co. v. Johnson, 49 Mich. 148.

[23] Hurt v. Salisbury, 55 Mo. 310. And see Garnett v. Richardson, 35 Ark. 144; Richardson v. Pitts, 71 Mo. 128; Bigelow v. Gregory, 73 Ill. 197; Eisfeld v. Kenworth, 50 Iowa. 389; Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652, 659.

Where a statute required the signers of articles of association, for the purpose of forming a corporation, to obtain a certificate from the attorney general, and declared that they should be a corporation "from the time of filing such certificate," it was held that obtaining and filing the certificate was a condition precedent. Richmond Factory Ass'n v. Clarke, 61 Me. 351.

[24] Mokelumne Hill Canal & Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658. See, also, Humphreys v. Mooney, 5 Colo. 282; Hyde v. Doe, 4 Sawy. 133, Fed. Cas. No. 6,969; Walton v. Riley, 85 Ky. 413; Portland & G. Turnpike Co. v. Bobb, 88 Ky. 226; Cross v. Pinckneyville Mill Co., 17 Ill. 54.

[25] Giving of a bond by the treasurer of a corporation was held not to be a condition precedent in Boston Acid Mfg. Co. v. Moring, 15 Gray (Mass.) 211.

And where a statute declared certain persons to be a corporation, and then required them to give a bond within a certain time, it was held that the giving of the bond was not a condition precedent. Boise City Canal Co. v. Pinkham, 1 Idaho, 790.

Subscriptions to the capital stock of a corporation are not conditions precedent to incorporation unless made so by statute. Schenectady & S. Plank Road Co.

§ 74. Failure to comply with directory provisions.—The validity of incorporation is not affected, even when attacked in a direct proceeding by the state, by failure to comply with provisions of the statute which are merely directory.

A directory provision in a statute is a provision, the compliance with which is not intended by the legislature as essential, and the failure to comply with which, therefore, constitutes a mere irregularity, and is not fatal to acts done or proceedings had thereunder; while a mandatory provision is a provision,

v. Thatcher, 11 N. Y. 102; Town of Searcy v. Yarnell, 47 Ark. 269; ante, § 48(f); post, § 504.

Where a statute provided that when twenty-five per cent of the minimum capital stock should be paid in, and so certified by a majority of the corporators to the state treasurer and comptroller, and a certificate of their organization transmitted to the clerk of the court of appeals to be recorded, and not before, they should be entitled to all benefits conferred by the act, it was held that such acts were not conditions precedent, as they could only be done by the corporators after organization. Hammond v. Straus, 53 Md. 1, 14.

A requirement that the amount of the capital stock of a corporation shall be fixed at the first meeting held under the charter does not impose a condition precedent. Proprietors of City Hotel in Worcester v. Dickinson, 6 Gray (Mass.) 586.

In a Rhode Island case it was held that where a statute provided that no act of incorporation should take effect until the persons therein incorporated should pay a certain sum to the state treasurer, such payment was a condition precedent; but that it was otherwise under a statute providing that no corporation should be organized under a charter until such a payment. Hughesdale Mfg. Co. v. Vanner, 12 R. I. 491.

Though statutes creating the Catholic bishop of Chicago a corporation sole, and providing that all conveyances made to any bishop should vest the title in him as such bishop, and in his successors, required him to file a verified statement of his appointment within a certain time, it was held that failure to file the statement did not affect his corporate existence, or his title to real estate conveyed to him. Chiniquy v. Catholic Bishop of Chicago, 41 Ill. 148.

Under a statute providing for the incorporation of a railroad company, naming commissioners to take subscriptions to the capital stock, and requiring the road to be commenced within three years from the passage of the act, and completed within ten years, it was held that the company had no legal existence, where the commissioners delayed taking subscriptions to the stock until nearly ten years after expiration of the ten-year limit. Bonaparte v. Baltimore, Hampden & L. R. R. Co., 75 Md. 340, 1 Keener's Cas. 77.

The election of directors or other officers, as required by the statute under which a corporation is organized, is not ordinarily a condition precedent to acquiring corporate existence. See Ashtabula & New Lisbon R. Co. v. Smith, 15 Ohio St. 328; Childs v. Smith, 55 Barb. (N. Y.) 45. But it is sometimes made so by the statute. See University R. Co. v. Holden, 63 N. C. 410; Teitig v. Boesman, 12 Mont. 404; People v. Bowen, 30 Barb. (N. Y.) 24.

the failure to comply with which renders an act done under the statute absolutely void. Failure to comply with a directory provision in a statute authorizing the formation of corporations does not render the organization of a corporation invalid.[26] Whether a particular provision is directory or not is determined by "the intention and true meaning of the legislature, deduced from the act, and sometimes aided by other acts *in pari materia,* and extraneous circumstances."[27]

Illustrations.—In a Massachusetts case, the existence of a corporation under a special act was attacked on the ground that, in the organization of the corporation, the call for the first meeting was signed by only one of the persons named in the act of incorporation, and not by a majority of them, as required by the statute. It was held, however, that this provision was merely directory, and as it did not appear that all persons interested were not actually notified of the meeting for organization, and it did appear that all the persons named in the act, with their associates, had accepted the act, organized under it, issued stock, elected officers, and carried on business, it was held that the corporation had a legal existence.[28] A like construction has been placed upon a provision requiring a duplicate certificate of organization to be filed in the office of the secretary of state,[29] upon a provision that the directors should be named in the articles of association,[30] upon a provision that the

[26] Newcomb v. Reed, 12 Allen (Mass.) 362, 1 Smith's Cas. 77, 1 Cum. Cas. 67; Cross v. Pinckneyville Mill Co., 17 Ill. 54; Eakright v. Logansport & Northern Indiana R. Co., 13 Ind. 404; Walworth v. Brackett, 98 Mass. 98; Braintree Water Supply Co. v. Inhabitants of Braintree, 146 Mass. 482; Proprietors of City Hotel in Worcester v. Dickinson, 6 Gray (Mass.) 586.

[27] Cross v. Pinckneyville Mill Co., 17 Ill. 54, 56.

[28] Newcomb v. Reed, 12 Allen (Mass.) 362, 1 Smith's Cas. 77, 1 Cum. Cas. 67.

[29] Cross v. Pinckneyville Mill Co., 17 Ill. 54. And see Granby Mining & Smelting Co. v. Richards, 95 Mo. 106; Baker v. Backus' Adm'r, 32 Ill. 79, 97; In re Shakopee Mfg. Co., 37 Minn. 91; Mokelumne Hill Canal & Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Veeder v. Mudgett, 95 N. Y. 295. But see Hurt v. Salisbury, 55 Mo. 310; Bigelow v. Gregory, 73 Ill. 197; Loverin v. McLaughlin, 161 Ill. 417; Eisfeld v. Kenworth, 50 Iowa, 389. See, also, ante, §§ 48(j), 71.

[30] Eakright v. Logansport & Northern Indiana R. Co., 13 Ind. 404.

amount of capital stock should be fixed and limited at the first meeting held under the charter,[31] and upon a provision that notice of the first meeting should be served on each corporator.[32]

Provisions not directory merely.—Provisions in a statute authorizing the formation of a corporation, particularly in the case of general laws, which require certain acts to be done in the organization of the corporation, are not to be construed as directory only, unless it clearly appears that the legislature did not intend to make a substantial compliance therewith a condition precedent to acquiring legal corporate existence. No positive requirement of the statute should be held directory merely on the ground that it is unimportant, for its importance is a question for the legislature, and not for the courts. Such provisions are mandatory, and a substantial compliance therewith is a condition precedent to the right to be a corporation.

In a leading Massachusetts case, persons undertook to organize a corporation under a general law without complying with the provisions of the statute requiring written articles of agreement fixing the amount of the capital stock, and setting forth distinctly the purpose for which and the place in which the corporation was established. It was held that these provisions were mandatory, and that no existence as a corporation was acquired. The court said: "There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted." And it was further said: "It is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being, which had the power of contracting debts or of rendering persons lia-

[31] Proprietors of City Hotel in Worcester v. Dickinson, 6 Gray 288.

[32] McClinch v. Sturgis, 72 Me. (Mass.) 586.

ble therefor as stockholders."[33] There have been similar decisions with respect to provisions of incorporation laws requiring the articles or certificate of association or incorporation to give the residence of each subscriber to the capital stock,[34] and to be filed in a certain office,[35] etc.

§ 75. Substantial compliance with statutory requirements sufficient.—Failure to comply literally with the statutory requirements in the organization of a corporation will not necessarily render the attempted incorporation invalid, even as against the state. All that is necessary is that the provisions of the statute shall be substantially complied with.

It is a general principle, affecting the construction of statutes, that when a statute confers rights and privileges, but imposes conditions precedent to be performed, a substantial, as distinguished from a literal, compliance with the requirements of the statute is all that is necessary; and this principle has repeatedly been applied in construing statutes authorizing the formation of corporations, and requiring certain acts to be performed as a condition precedent. As is stated above, all that is necessary to legal incorporation under such a statute, and to the existence of a corporation, not merely *de facto,* but *de jure,* is that the provisions of the statute shall be substantially complied with.[36]

[33] Utley v. Union Tool Co., 11 Gray (Mass.) 139, 1 Cum. Cas. 967. See, also, Montgomery v. Forbes, 148 Mass. 249, 1 Smith's Cas. 94, 2 Keener's Cas. 1945, 1 Cum. Cas. 69. And see ante, § 71.

[34] Busenback v. Attica & B. Gravel Road Co., 43 Ind. 265.

[35] Hurt v. Salisbury, 55 Mo. 310; Bigelow v. Gregory, 73 Ill. 197; Eisfeld v. Kenworth, 50 Iowa, 389; ante, §§ 48(j), 71.

[36] People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 1 Smith's Cas. 74; Mokelumne Hill Canal & Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Spring Valley Water Works v. City & County of San Francisco, 22 Cal. 434; People v. Stockton & Visalia R. Co., 45 Cal. 306, 13 Am. Rep. 178; Eakright v. Logansport & Northern Indiana R. Co., 13 Ind. 404; Hughes v. Antietam Mfg. Co., 34 Md. 316, 324; Rogers v. Danby Universalist Soc., 19 Vt. 187; Memphis & St. F. Plank Road Co. v. Rives, 21 Ark. 302; State v. Wood, 13 Mo. App. 139; Buffalo & Pittsburg R. Co. v. Hatch, 20 N. Y. 157; Ex parte Spring Valley Water Works, 17 Cal. 132; People v. Cheeseman, 7 Colo. 376; Carpenter v. Frazier, 102 Tenn. 462; People v. Kingston & M. Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551; Porter v. Sherman County Banking Co., 36 Neb. 271; Lord v. Essex Bldg. Ass'n No. 4, 37 Md. 320; Ames v. Port Huron Log Driving & Booming Co., 6 Mich. 266;

Illustrations.—Thus, where a statute required the affidavit attached to the certificate of incorporation to state that a certain percentage of the amount of the stock subscribed had been actually paid in "in good faith," and the affidavit omitted the words quoted, but such a statement was contained in the certificate to which the affidavit was attached, it was held that the statute was substantially complied with, and that the incorporation was legal, even as against a direct attack by the state.[37] It has also been held that a provision that one-half the capital stock shall be actually paid in in lawful money of the United States is substantially complied with if the corporation has property whose market value is greater than the par value of the stock.[38]

Where a statute required the certificate of incorporation to state the names of the city or town and county in which the "principal place of business" was to be located, it was held that the organization of a corporation was not rendered invalid by failure to describe the place of business of the corporation as its "principal" place of business.[39] And where a statute required a petition for incorporation to specify the objects of the association and the particular business proposed to be carried

Thornton v. Balcom, 85 Iowa, 198; Seaton v. Grimm (Iowa) 81 N. W. 225.

[37] People v. Stockton & Visalia R. Co., 45 Cal. 306, 13 Am. Rep. 178.

Under a statute requiring the certificate of registration of a corporation given by the secretary of state to be registered in the register's office of the county in which the principal place of business of the corporation is situated, with the facsimile of the great seal of the state, the existence of a corporation cannot be attacked, where the certificate has been registered, because the facsimile of the seal is not accurately drawn. Carpenter v. Frazier, 102 Tenn. 462.

In Buffalo & Pittsburg R. Co. v. Hatch, 20 N. Y. 157, it was held that a statement in an affidavit of the directors of a railroad company that "ten per cent. has been paid in cash" on subscriptions is a substantial compliance with a requirement that the affidavit shall show that such amount has been paid "in good faith" in cash.

[38] State v. Wood, 13 Mo. App. 139.

[39] Ex parte Spring Valley Water Works, 17 Cal. 132.

But where a statute required the application for incorporation to show the place of business of the proposed corporation, and the application merely stated the location of its "office," it was held insufficient, since a corporation may have its office in one place, and its place of business in another. In re Enterprise Mutual Beneficial Ass'n, 10 Phila. (Pa.) 380.

on, it was held sufficient where the name of a proposed corporation, which was stated in the petition, indicated the business proposed to be carried on.[40] So, where a notary's certificate stated that the persons who signed the certificate of incorporation appeared before him and acknowledged it, but did not state that they were personally known to him, it was held a substantial and sufficient compliance with a requirement that the certificate should be acknowledged.[41]

If all the requirements of the statute are complied with in organizing a corporation, the fact that they are not complied with in the order prescribed by the statute does not necessarily render the organization invalid. Thus, where the charter of a railroad company required the directors to be named in the articles of association, it was held a substantial and sufficient compliance therewith to adopt the articles at the time of naming directors.[42]

Positive requirement cannot be omitted.—From the fact that a substantial compliance with the statute in the organization of a corporation is sufficient, "it does not follow that any positive statutory requirement can be omitted on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court."[43]

[40] Van Pelt v. Home Bldg. & Loan Ass'n, 79 Ga. 439.

[41] People v. Cheeseman, 7 Colo. 376. And see Johnston v. Ewing Female University, 35 Ill. 518.

Publication of notice of incorporation at any time before the incurring of debts by the corporation was held a substantial compliance (so as to prevent individual liability) with the Iowa statute, which provides that notice of incorporation must be published for four successive weeks, and must state whether private property is to be exempt from corporate debts; that the corporation may commence business as soon as its articles are filed; that its acts shall be valid if the publication is made and the articles filed with the secretary of state within three months of filing in the recorder's office, and that failure to comply substantially with such provisions shall render the stockholders individually liable for corporate debts,—since the object of the statute is merely to inform persons dealing with the corporation that they are dealing with a corporation, and not with a natural person. Seaton v. Grimm (Iowa) 81 N. W. 225.

[42] Eakright v. Logansport & Northern Indiana R. Co., 13 Ind. 404.

[43] People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 1 Smith's Cas. 74. See, also, People v. Selfridge, 52 Cal. 331, 1 Keener's Cas. 90; Martin v. Deetz, 102 Cal. 55; Bigelow v. Gregory, 73 Ill. 197; Gent v. Manufacturers'

Thus, where a statute required articles of incorporation to be subscribed and acknowledged by five or more persons, and such articles, though subscribed by five persons, were acknowledged by four only, it was held that this was not a sufficient compliance with the statute, and that there was no legal incorporation as against a direct attack by the state.[44]

And where a statute required the certificate of incorporation to show "the manner of carrying on the business" of the corporation, a certificate setting forth that the "manner of carrying on the business shall be such as the association may from time to time prescribe by rules, regulations, and by-laws not inconsistent with the laws of the state," was held insufficient.[45] Failure to publish notice, or to publish the articles of association or certificate of incorporation, or to file the same for record, as required by the statute, is a substantial failure to comply with the statute.[46]

§ 76. Surplusage does not affect incorporation.—The validity of the organization of a corporation is not affected by the fact that the application, articles of association, or certificate state matters not required by the statute, if they contain all the statements which are required, for the unnecessary statements may be rejected as surplusage.

Illustrations.—Thus, where the articles or certificate claim powers and privileges which are not authorized by the statute, they are void as to such claims only, and the validity of the

& Merchants' Mut. Ins. Co., 107 Ill. 652; Utley v. Union Tool Co., 11 Gray (Mass.) 139, 1 Cum. Cas. 967; Montgomery v. Forbes, 148 Mass. 249, 1 Smith's Cas. 94, 2 Keener's Cas. 1945, 1 Cum. Cas. 69; Clegg v. Hamilton & Wright County Grange Co., 61 Iowa, 121; State v. Central Ohio Mut. Relief Ass'n, 29 Ohio St. 399; Eisfeld v. Kenworth, 50 Iowa, 389; Bergeron v. Hobbs, 96 Wis. 641; Slocum v. Head, 105 Wis. 431. And see ante, §§ 48, 71.

[44] People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 1 Smith's Cas. 74.

[45] State v. Central Ohio Mut. Relief Ass'n, 29 Ohio St. 399.

[46] Eisfeld v. Kenworth, 50 Iowa, 389; Bigelow v. Gregory, 73 Ill. 197; Bergeron v. Hobbs, 96 Wis. 641; Slocum v. Head, 105 Wis. 431; ante, §§ 48(e), (j), 71.

Where a statute required the articles of association to be filed in the clerk's office of the county in which the business of the company was to be carried on, and they were filed in another county, and a copy of the certificate of incorporation, signed by the secretary of state, was filed with the clerk of the county in which the

organization is not otherwise affected. If the corporation exercises such unauthorized powers and privileges, the state may institute proceedings against it, but no one else can attack the validity of its organization. In other words, as was said in a New York case, if unauthorized provisions are added to the articles of incorporation, all acts done pursuant to such provisions will be void; but until the company is proceeded against by the state for an abuse of its franchises, its rights as a corporation will not be affected by such provisions.[47]

§ 77. Waiver and cure of defects.—Irregularities and defects in the organization of a corporation may be waived or cured by the state, either expressly, or impliedly by recognition of the corporation as legally existing.

Since the conditions imposed by the legislature upon persons forming a corporation under a statute are imposed by the state merely on grounds of public policy, they may be waived by the state in the case of any particular corporation by a statute expressly or impliedly approving and ratifying its organization without a compliance therewith.[48] For example, the state may

business was to be carried on, it was held that this was not a substantial compliance with the statute. Martin v. Deetz, 102 Cal. 55.

Under a statute requiring the "filing" of a certificate of incorporation, recording the certificate, without leaving the same on file, is not a substantial compliance. Bergeron v. Hobbs, 96 Wis. 641.

When the statute requires the articles of association to be signed by the corporators, and "a copy thereof, verified under oath" by two or more of them as a true copy, to be recorded in the office of the register of deeds, recording of the original articles, instead of a verified copy, is not sufficient to exempt the corporators from liability as partners to the creditors of the corporation. Slocum v. Head, 105 Wis. 431.

[47] Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546. See, also, Heck v. McEwen, 12 Lea (Tenn.) 97, 1 Keener's Cas. 97; Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325, 341; Shick v. Citizens' Enterprise Co., 15 Ind. App. 329; Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch.) 56 S. W. 35.

Statement of unnecessary or improper matters may, however, be ground for the court's or officer's refusal to grant an order or certificate of incorporation. In re Stevedores' Beneficial Ass'n, 14 Phila. (Pa.) 130.

Where a statute provides that a corporation shall not exist for more than twenty years, its incorporation is not invalid because its articles of association provide for an existence of fifty years, but it is a valid corporation for the period of twenty years. People v. Cheeseman, 7 Colo. 376.

[48] Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; Boykin v. State, 96 Ala. 16; State v. Webb, 110 Ala. 214;

thus waive and cure the failure of the corporators to properly sign and acknowledge the articles of association, or failure to file them for record in the office of the secretary of state.[49]

Recognition of a corporation by the legislature as legally existing is sufficient to cure defects in its organization.[50] Thus, defects in the organization of a corporation are cured by a statute authorizing it to increase its capital stock, though the statute does not in any way refer to such defects.[51]

Irregularities and defects may be thus waived or cured by

Riker v. Cornwell, 113 N. Y. 115; Cayuga Lake R. Co. v. Kyle, 64 N. Y. 185; Syracuse City Bank v. Davis, 16 Barb. (N. Y.) 188; Black River & Utica R. Co. v. Barnard, 31 Barb. (N. Y.) 258; Workingmen's Bldg. & Loan Ass'n v. Coleman, 89 Pa. St. 428; Williams v. Union Bank, 2 Humph. (Tenn.) 339; McDougald v. Bellamy, 18 Ga. 411; People v. Perrin, 56 Cal. 345; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; Rice v. Rock Island & Alton R. Co., 21 Ill. 93; Illinois Grand Trunk R. Co. v. Cook, 29 Ill. 237; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; People v. Farnham, 35 Ill. 562; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Snell v. City of Chicago, 133 Ill. 413; McCulloch v. State, 11 Ind. 424; Basshor v. Dressel, 34 Md. 503; Attorney General v. Joy, 55 Mich. 94; Atlantic & Pacific R. Co. v. City of St. Louis, 66 Mo. 228; St. Louis R. Co. v. Northwestern St. Louis Ry. Co., 2 Mo. App. 69; Trustees of McIntire Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio, 302, 34 Am. Dec. 436; Spinning v. Home Bldg. & Sav. Ass'n, 26 Ohio St. 483; Kanawha Coal Co. v. Kanawha & Ohio Coal Co., 7 Blatchf. 391, Fed. Cas. No. 7,606; Western Union Tel. Co. v. Union Pac. R. Co., 3 Fed. 721, 729; Comanche County v. Lewis, 133 U. S. 198.

[49] Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; Ricker v. Cornwell, 113 N. Y. 115.

[50] Kanawha Coal Co. v. Kanawha & Ohio Coal Co., 7 Blatchf. 391, Fed. Cas. No. 7,606; Comanche County v. Lewis, 133 U. S. 198; Town of Andes v. Ely, 158 U. S. 312; State v. Webb, 110 Ala. 214; Cayuga Lake R. Co. v. Kyle, 64 N. Y. 185; Black River & Utica R. Co. v. Barnard, 31 Barb. (N. Y.) 258; Cowell v. Colorado Springs Co., 3 Colo. 82; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; People v. Farnham, 35 Ill. 562; McAuley v. Columbus, Chicago & I. C. R. Co., 83 Ill. 348; Snell v. City of Chicago, 133 Ill. 413; Atlantic & Pacific R. Co. v. City of St. Louis, 66 Mo. 228; St. Louis R. Co. v. Northwestern St. Louis R. Co., 2 Mo. App. 69; Koch v. North Avenue Ry. Co., 75 Md. 222; Basshor v. Dressel, 34 Md. 503; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344, 371; Attorney General v. Joy, 55 Mich. 94; Trustees of McIntire Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio, 203, 34 Am. Dec. 436; Morris & E. R. Co. v. Hudson Tunnel R. Co., 38 N. J. Law, 548; Williams v. Union Bank, 2 Hump. (Tenn.) 339; Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch.) 56 S. W. 35. Compare Thornton v. Marginal Freight Ry. Co., 123 Mass. 32, 1 Cum. Cas. 462.

It has been held in Louisiana that ratification or recognition by the legislature takes effect only from the time thereof, and does not relate back so as to affect previous contracts and other transactions. Chaffe v. Ludeling, 27 La.

the legislature by a special act, as well as by a general law, unless there is some constitutional prohibition in the way, and it has been held that a special act for this purpose is not within a constitutional prohibition against the *creation* of corporations by special act.[52]

In order that irregularities in the organization of a corporation may be cured by an act of the legislature, on the ground that it is a legislative recognition of the corporation, the act must be such as to amount to a recognition of the corporation as a legally existing body. In a Massachusetts case it was held that a provision in a statute that nothing in the act contained should be construed as affecting the legal rights of a certain corporation could not be construed as a legislative recognition that such corporation had a legal existence.[53] And in a Wisconsin case it was held that an act of the legislature supplementary to an act of incorporation is not conclusive of the existence of the corporation at the time of its passage, merely because the corporate name is used throughout the act, if the act is consistent with a belief upon the part of the legislature that the corporation was not then organized.[54]

Ann. 607, 611. See, however, Spinning v. Home Bldg. & Sav. Ass'n, 26 Ohio St. 483, and other cases cited above.

[51] State v. Webb, 110 Ala. 214.

An act of the legislature authorizing a municipal corporation to sell its stock in a railroad company is a recognition of the legal existence of the railroad company, and cures defects in its organization. Town of Andes v. Ely, 158 U. S. 312.

It has also been held that irregularity in the organization of a corporation is cured by an act of the legislature authorizing it to issue negotiable obligations, Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; by an act granting additional time for the construction of its works, Morris & E. R. Co. v. Hudson Tunnel R. Co., 38 N. J. Law, 548; by an act recognizing the business of the corporation and changing its name, White v. Ross, 15 Abb. Pr. (N. Y.) 66.

[52] Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; Boykin v. State, 96 Ala. 16; State v. Webb, 110 Ala. 214; Koch v. North Ave. Ry. Co., 75 Md. 222; Basshor v. Dressel, 34 Md. 503; Syracuse City Bank v. Davis, 16 Barb. (N. Y.) 188. Contra, Oroville & Virginia R. Co. v. Plumas County Sup'rs, 37 Cal. 354.

[53] Thornton v. Marginal Ry. Co., 123 Mass. 32. And see ante, § 43.

[54] Attorney General v. Chicago & Northwestern Ry. Co., 35 Wis. 425. It was held in this case that the rule that legislative recognition of a corporation de facto will cure irregularities in its organization does not apply where there was no organization at the time of the statute. It was also held that an amendment of the charter

Waiver by municipality.—Failure to perform conditions precedent, prescribed by the legislature, in an attempt to organize a corporation, cannot be waived by a municipal corporation which is interested in the formation of the corporation. Thus, where a statute authorized the organization of a corporation to construct waterworks and supply a municipal corporation and its inhabitants with water "whenever" the common council of the municipality should, by resolution, declare it expedient to have works constructed, and inexpedient for the municipality itself to construct them, it was held that failure to procure such a resolution before organizing a waterworks company could not be waived by the municipality, so as to render the company a corporation as against a direct attack by the state in *quo warranto* proceedings.[55]

II. INDIVIDUAL LIABILITY ON FAILURE TO INCORPORATE.

§ 78. Liability of associates—(a) In general.—In most jurisdictions, but not in all, persons who assume to act as a corporation, when they have neither de jure nor de facto corporate existence, are in the position of partners as to third persons, and are individually liable as such, both for torts committed and on contracts made by their agents in the course of the business, unless the person dealing with them is estopped to deny their existence as a corporation. And in some states they are regarded as partners inter se. In some states, liability is imposed by statute.

(b) Liability on contracts—Prevailing doctrine.—As we shall presently see, persons who attempt in good faith to organize as a corporation under a law authorizing them to incorporate, and colorably comply with the provisions of the law, and afterwards

of a railroad company so as to authorize an extension of its road, and to provide that whenever it should decide to so extend its road it might increase its capital stock, etc., created, in the absence of proof to the contrary, a presumption that the corporation was in existence at the time the amendment was passed, but that it was not conclusive as to the legal existence of the corporation. In People v. Rensselaer Ins. Co., 38 Barb. (N. Y.) 323, it was held that a legislative amendment authorizing a fire insurance company to take marine risks on complying with a certain statute did not amount to a recognition of the valid incorporation of the company.

[55] Attorney General v. Hanchett, 42 Mich. 436.

exercise corporate powers in pursuance of such organization, have a *de facto* corporate existence, at least for the purpose of contracting, and their existence as a corporate body cannot be collaterally attacked for the purpose of holding them individually liable on a contract made by them as a corporation.[56] We shall also see that, as a general rule, a person who contracts with an association as a corporation is estopped in most jurisdictions to deny its incorporation for the purpose of holding the associates individually liable.[57]

Persons, however, may assume to act and contract as a corporation when they have not even a *de facto* corporate existence, and the circumstances, or the law in the particular jurisdiction, may be such that a person contracting with them is not estopped to deny that they are a corporation. In such a case, it is held in many states that, if the business is not unlawful as being prohibited by positive law, the other party to the contract may hold them individually liable as partners, even though they may not have participated in the business of the association otherwise than by signing articles of association or agreement, on the ground that, in contemplation of law, they are just as much partners, at least as to third persons not estopped, as if they had not assumed to be a corporation.[58]

[56] Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989; McClinch v. Sturgis, 72 Me. 288; Duke v. Taylor, 37 Fla. 64; Globe Pub. Co. v. State Bank of Nebraska, 41 Neb. 175; post, § 81 et seq.

[57] Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 1 Smith's Cas. 112; Gartside Coal Co. v. Maxwell, 22 Fed. 197; Cory v. Lee, 93 Ala. 468; Nebraska Nat. Bank of York v. Ferguson, 49 Neb. 109; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; post, § 84.

[58] Wechselberg v. Flour City Nat. Bank, 24 U. S. App. 308, 322, 64 Fed. 90, 98; State v. How, 1 Mich. 512; Whipple v. Parker, 29 Mich. 369; Garnett v. Richardson, 35 Ark. 144; Shields v. Clifford Hill Land Co., 94 Tenn. 123, 45 Am. St. Rep. 700; Guckert v. Hacke, 159 Pa. St. 303; Paterson v. Arnold, 45 Pa. St. 410; Martin v. Fewell, 79 Mo. 401, 1 Cum. Cas. 982; Richardson v. Pitts, 71 Mo. 128; Ferris v. Thaw, 72 Mo. 446; Smith v. Warden, 86 Mo. 382; Cleaton v. Emery, 49 Mo. App. 345; Davidson v. Hobson, 59 Mo. App. 130; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977; Chaffe v. Ludeling, 27 La. Ann. 607; Williams v. Hewitt, 47 La. Ann. 1076; Vredenburg v. Behan, 33 La. Ann. 627; Field v. Cooks, 16 La. Ann. 153; Coleman v. Coleman, 78 Ind. 344; Bigelow v. Gregory, 73 Ill. 197; Flagg v. Stowe, 85 Ill. 164; Pettis v. Atkins, 60 Ill. 454; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 74, 1 Smith's Cas. 112; Loverin v. McLaughlin, 161 Ill.

According to this doctrine, it has been held that it is not necessary that persons dealing with an association shall know that a certain person is a member in order to hold him liable as a partner, for "there is a primary contract liability, and it is not dependent upon the knowledge or understanding of those dealing with the purported corporation."[59] It has also been held that the rule is not changed by the fact that the contract is executed in a name or manner which would be appropriate to a corporate body.[60]

It has been held, however, that there is no liability of the associates as partners if the transaction is unlawful because the business of the association is expressly prohibited by law, or is contrary to public policy.[61]

View that associates are not liable as partners.—In some states, the doctrine that the stockholders or members of an association which is held out as being a corporation, when it has no corporate existence either *de jure* or *de facto,* are individually liable as partners, because of their membership merely, on a contract made by the officers of the association, is repudiated on the ground that no such relation or liability is contemplated by them, and it is held that, in the absence of a statute imposing individual liability upon the stockholders or members of such an association, the only remedy is against the officers or agents who made the contract.[62] Even in these states,

417, 435; Duke v. Taylor, 37 Fla. 64; Taylor v. Branham, 35 Fla. 297, 48 Am. St. Rep. 249; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; Slocum v. Head, 105 Wis. 431; Bergeron v. Hobbs, 96 Wis. 641; McLennan v. Hopkins, 2 Kan. App 260; Globe Pub. Co. v. State Bank of Nebraska, 41 Neb. 175; Johnson v. Corser, 34 Minn. 355, 1 Smith's Cas. 100; Hill v. Beach, 12 N. J. Eq. 31; Booth v. Wonderly, 36 N. J. Law, 250; Haslett's Ex'rs v. Wotherspoon, 2 Rich. Eq. (S. C.) 395. And see Frost v. Walker, 60 Me. 468.

[59] Wechselberg v. Flour City Nat. Bank, 24 U. S. App. 308, 322, 64 Fed. 90, 98.

[60] Chaffe v. Ludeling, 27 La. Ann. 607. "Obligors," said the court in this case, "are bound not by the style which they give to themselves, but by the consequences which they incur by reason of their acts. It matters not what they chose to call themselves. The question is, how do their acts bind them?" See, however, post, § 92(c).

[61] State v. How, 1 Mich. 512.

[62] Fay v. Noble, 7 Cush. (Mass.) 188, 1 Cum. Cas. 420; Trowbridge v. Scudder, 11 Cush. (Mass.) 83; Ward v. Brigham, 127 Mass. 24; Humphreys v. Mooney, 5 Colo. 282; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Canfield v. Gregory,

however, if a single individual assumes to act as a corporation, and enters into a contract as such, or if several fraudulently assume to so act, he or they may be held individually liable thereon, assuming that the other party to the contract is not estopped.[63]

In a federal case it was said by Mr. Justice Brewer: "I think the true rule is this: that where persons knowingly and fraudulently assume a corporate existence, or pretend to have a corporate existence, they can be held liable as individuals; but where they are acting in good faith, and suppose that they

66 Conn. 9; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; Blanchard v. Kaull, 44 Cal. 440; Gartside Coal Co. v. Maxwell, 22 Fed. 197; Medill v. Collier, 16 Ohio St. 599; Second Nat. Bank of Cincinnati v. Hall, 35 Ohio St. 158, 164; Rutherford v. Hill, 22 Or. 218, 29 Am. St. Rep. 596, 1 Smith's Cas. 109. And see First Nat. Bank of Salem v. Almy, 117 Mass. 476.

What was said on this point in Humphreys v. Mooney, 5 Colo. 282, Canfield v. Gregory, supra, and Planters' & Miners' Bank v. Padgett, 69 Ga. 159, was mere dictum, for in the first two cases it was held that there was a corporation de facto, and in the last-mentioned case the other party to the contract was estopped by dealing with the association as a corporation.

In Rutherford v. Hill, 22 Or. 218, 29 Am. St. Rep. 596, 1 Smith's Cas. 109, it was held that where two or more persons execute and file articles of incorporation under a general law, but do nothing further towards effecting an organization or carrying on the proposed business, they do not thereby become liable as partners, where one of them assumes the corporate name and does business and incurs liabilities under it.

In New York the rule is that stockholders in an association which has attempted but failed to become incorporated are liable as partners if they have participated in the business, or if they have expressly authorized or ratified a contract made by the association; but that they are not liable unless made so by statute, where they have not participated in the business otherwise than by signing articles of association for the purpose of forming a corporation, and have not authorized or ratified the contract on which it is sought to hold them liable. National Union Bank of Watertown v. Landon, 45 N. Y. 410; Central City Sav. Bank v. Walker, 66 N. Y. 424; Seacord v. Pendleton, 55 Hun (N. Y.) 579; West Point Foundry Ass'n v. Brown, 3 Edw. Ch. (N. Y.) 284; Wells v. Gates, 18 Barb. (N. Y.) 554; Fuller v. Rowe, 57 N. Y. 23.

In Central City Sav. Bank v. Walker, 66 N. Y. 424, it was held that stockholders in a corporation were not liable as partners on a contract made after the expiration of its charter by an agent appointed during its existence, unless they authorized or ratified the same with full knowledge of the facts, and that receipt of dividends by them after expiration of the charter was not a ratification, where they received the same as from earnings of the corporation, and without knowledge of the expiration of its charter.

[63] Montgomery v. Forbes, 148 Mass. 249, 1 Smith's Cas. 94, 2 Keener's Cas. 1945, 1 Cum. Cas. 69.

are legally incorporated,—that they are stockholders in a valid corporation,—and where the corporation assumes to transact business for a series of years, and the assumed corporate existence is not challenged by the state, then they cannot be held liable, as individuals, as members of the corporation."[64]

——**Statutory liability.**—In some states this question is set at rest by a statute expressly imposing individual liability upon the members or stockholders of an association assuming to act as a corporation without organizing in compliance with the law.[65]

(c) **Members as partners inter se.**—In some of the states in which it is held that members of an association who assume to act as a corporation without incorporation are liable as partners, the courts have gone further, and have held them to be in the position of partners *inter se,* both for the purpose of determining and protecting their rights in the property of the association,[66] and for the purpose of holding them liable to contribution where the managing members are held liable for more than their proportion of the indebtedness of the association.[67]

The better opinion, however, is that they are not partners *inter se* in the absence of a partnership agreement between them, for there is not the same reason for recognizing such a relation as between themselves, contrary to their agreement, as there is for holding them liable to the persons dealing with them.[68] As was said by Mr. Justice Harlan in the supreme court of the United States, "persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist."[69]

(d) **Liability for torts.**—Persons who assume to do business

[64] Gartside Coal Co. v. Maxwell, 22 Fed. 197.

[65] Clegg v. Hamilton & Wright County Grange Co., 61 Iowa, 121.

[66] Whipple v. Parker, 29 Mich. 369; Stowe v. Flagg, 72 Ill. 397; Flagg v. Stowe, 85 Ill. 164; African M. E. Church v. City of New Orleans, 15 La. Ann. 441; Factors' & Traders' Ins. Co. v. New Harbor Protection Co., 37 La. Ann. 233.

[67] Richardson v. Pitts, 71 Mo. 128; Flagg v. Stowe, 85 Ill. 164.

[68] Heald v. Owens, 79 Iowa, 23; Ward v. Brigham, 127 Mass. 24; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 74, 1 Smith's Cas. 112; London Assurance Corp. v. Drennen, 116 U. S. 461.

[69] London Assurance Corp. v. Drennen, 116 U. S. 461.

as a corporation, without either a *de jure* or a *de facto* corporate existence, as because of their failure to file articles of association, are liable, as partners are, for the torts of their agents or employes in the course of the business.[70]

§ 79. Individual liability of officers and agents.— Persons who assume to contract as officers or agents of a pretended corporation may be held individually liable, unless the association is a corporation de facto, or unless the person dealing with them is estopped to deny its corporate existence. In some states, such liability is imposed by statute.

It is a familiar principle of the law of agency in most jurisdictions, that a person who acts as agent without authority, or without a principal, is himself regarded as a principal, and is subject to all the liabilities of a principal, and this doctrine applies with full force when persons assume to act for a corporation which has no existence. If persons, therefore, purporting to act as officers or agents of a corporation which has no existence, either *de jure* or *de facto,* make contracts or do other acts as agents, they become themselves principals and are personally liable.[71] In some states, the liability cannot be enforced by action on the contract, but the remedy is by action sounding in tort, for deceit or for false warranty of authority.[72] As we shall presently see, officers and agents of an association held out as a corporation are not personally liable on contracts made by them for the association if it has a *de facto* corporate existence,[73] or if the other party to the contract is estopped to deny its corporate existence.[74]

In some jurisdictions, as we shall see in another chapter, liability is expressly imposed by statute upon the directors or

[70] Smith v. Warden, 86 Mo. 382, where they were held liable as partners for personal injuries caused by the explosion of a steam boiler.

[71] Fay v. Noble, 7 Cush. (Mass.) 188, 1 Cum. Cas. 420; Montgomery v. Forbes, 148 Mass. 249, 1 Cum. Cas. 69, 1 Smith's Cas. 94, 2 Keener's Cas. 1945; Walton v. Oliver, 49 Kan. 107, 33 Am. St. Rep. 355; Hurt v. Salisbury, 55 Mo. 310; Glenn v. Bergmann, 20 Mo. App. 343; Loverin v. McLaughlin, 161 Ill. 417, 435; Wechselberg v. Flour City Nat. Bank, 24 U. S. App. 308, 64 Fed. 90.

[72] Blanchard v. Kaull, 44 Cal. 440. And see works on agency.

[73] Post, § 81(b).

[74] Post, § 84(g).

other officers of a corporation assuming to act as such without having complied with statutory requirements in the organization of the corporation.[75]

III. De Facto Corporations—Collateral Attack.

§ 80. In general.—If an association assuming to act as a corporation has been so far organized in compliance with the law as to be a de facto corporation, the general rule is that its existence as a corporation cannot be collaterally attacked, either by the state or by private individuals, although its organization may have been so irregular and defective that the state might bring a direct proceeding against it to oust it from the exercise of corporate powers.

By the weight of authority, an association is a de facto corporation, within this rule, when the associates have in good faith attempted to organize as a corporation under a valid law, and for a purpose authorized by the law, and have colorably or apparently complied with the requirements of the law, and have afterwards assumed to exercise corporate powers under the law, but not otherwise.

Although failure to comply with the mandatory requirements of the statute in organizing a corporation will prevent the formation of a corporation *de jure*,—that is, a corporation which will have a legal existence and right to exercise corporate powers as against a direct proceeding by the state to question its corporate existence,—it does not necessarily prevent the formation of a *de facto* corporation, or a corporation which will have a valid existence as against others than the state. When the state brings *quo warranto* proceedings against an association to question its right to exercise corporate powers, the association must show that all conditions precedent prescribed by the statute under which it was organized were substantially complied with, as this is necessary to the existence of a corporation *de jure*.[76] But as a general rule, when the corporate existence of an association is collaterally attacked, either by an individual or by the state, it is only necessary for it to show that it is a corporation *de facto*. "It is entirely settled," said the New Jersey court,

[75] See post, chapter xxiv. [76] See post, § 95.

"that the corporate existence of such corporation *de facto* cannot be inquired into collaterally. It is, as to all who contract with it, to be assumed to be a corporation *de jure*. The legality of its corporate existence may be inquired into by the state, but not by any one else. And this is as true where the corporation is formed under a general law as it is where the corporate existence is claimed under a special charter."[77] There are any number of decisions supporting this doctrine.[78] "In other

[77] Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989.

[78] United States: Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co., 82 Fed. 642; Toledo, St. Louis & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 86 Fed. 929; Andrews v. National Foundry & Pipe Works, 46 U. S. App. 619, 77 Fed. 774; Farmers' Loan & Trust Co. v. Toledo, Ann Arbor & N. M. R. Co., 67 Fed. 49.

Alabama: Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; Snider's Sons' Co. v. Troy, 91 Ala. 224, 24 Am St. Rep. 887, 1 Smith's Cas. 104; Bibb v. Hall, 101 Ala. 79; Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340.

Arkansas: Town of Searcy v. Yarnell, 47 Ark. 269.

California: Rondell v. Fay, 32 Cal. 354; People v. La Rue, 67 Cal. 530; Spring Valley Water Works v. City & County of San Francisco, 22 Cal. 434; Stockton & L. Gravel Road Co. v. Stockton & Copperopolis R. Co., 45 Cal. 680; Pacific Bank v. De Ro, 37 Cal. 538; Bakersfield Town Hall Ass'n v. Chester, 55 Cal. 99; First Baptist Church of San Jose v. Braham, 90 Cal. 22; Los Angeles Holiness Band v. Spires, 126 Cal. 541.

Colorado: Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113; Humphreys v. Mooney, 5 Colo. 282; Jones v. Aspen Hardware Co., 21 Colo. 263; City of Denver v. Mullen, 7 Colo. 345.

Connecticut: New Haven Wire Co. Cases, 57 Conn. 352, 394.

Delaware: City of Wilmington v. Addicks, 7 Del. Ch. 56.

Georgia: Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306.

Illinois: Thompson v. Candor, 60 Ill. 244; Mix v. National Bank of Bloomington, 91 Ill. 20, 33 Am. Rep. 44; Blake v. People, 109 Ill. 504; People v. Trustees of Schools, 111 Ill. 171; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Smith v. Mayfield, 163 Ill. 447, 457; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 1 Smith's Cas. 112; Cozzens v. Chicago Hydraulic-Press Brick Co., 166 Ill. 216; Morrison v. Forman, 177. Ill. 427.

Indiana: Heaston v. Cincinnati & Ft. Wayne R. Co., 16 Ind. 275, 75 Am. Dec. 430, 1 Cum. Cas. 417; Aurora & Cincinnati R. Co. v. Miller, 56 Ind. 88; Crowder v. Town of Sullivan, 123 Ind. 486; Williamson v. Kokomo Bldg. & Loan Fund Ass'n, 89 Ind. 389; North v. State, 107 Ind. 356; Williams v. Citizens' Ry. Co., 130 Ind. 71, 30 Am. St. Rep. 201; Doty v. Patterson (Ind.) 56 N. E. 668.

Kansas: Reisner v. Strong, 24 Kan. 410; Chicago, Kansas & W. R. Co. v. Stafford County Com'rs, 36 Kan. 121; Mendenhall v. Burton, 42 Kan. 575.

Kentucky: Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; Gill's Adm'x v. Kentucky & C. Gold & Silver Min. Co., 7 Bush (Ky.) 635.

Maine: McClinch v. Sturgis, 72 Me. 288; Taylor v. Portsmouth, Kittery & Y. St. R. Co., 91 Me. 193.

Maryland: Laflin & Rand Pow-

words, mere irregularities in organization cannot be shown collaterally, where there is no defect of power."[79]

"The reason is that if rights and franchises have been usurped

der Co. v. Sinsheimer, 46 Md. 315, 24 Am. Rep. 522; Keene v. Van Reuth, 48 Md. 184.

Massachusetts: Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264, 1 Cum. Cas. 420; Appleton Mut. Fire Ins. Co. v. Jesser, 5 Allen (Mass.) 446; Barrett v. Mead, 10 Allen (Mass.) 337.

Michigan: Wilcox v. Toledo & Ann Arbor R. Co., 43 Mich. 584; Toledo & Ann Arbor R. Co. v. Johnson, 55 Mich. 456; Nichols v. Ann Arbor & Y. St. Ry. Co., 87 Mich. 361; Canal St. Gravel Road Co. v. Paas, 95 Mich. 372.

Minnesota: Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 1 Smith's Cas. 87; Trustees of East Norway Lake N. E. L. Church v. Frolslie, 37 Minn. 447, 2 Keener's Cas. 1949.

Missouri: Catholic Church at Lexington v. Tobbeln, 82 Mo. 418; Town of Fredericktown v. Fox, 84 Mo. 59; Finch v. Ullman, 105 Mo. 255, 24 Am. St. Rep. 383.

Nebraska: Lincoln Bldg. & Sav. Ass'n v. Graham, 7 Neb. 173; Haas v. Bank of Commerce, 41 Neb. 754; Kleckner v. Turk, 45 Neb. 176.

New Hampshire: Haynes v. Brown, 36 N. H. 545, 562; Saunders v. Farmer, 62 N. H. 572.

New Jersey: Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548; Vanneman v. Young, 52 N. J. Law, 403; Union Water Co. v. Kean, 52 N. J. Eq. 111.

New York: Eaton v. Aspinwall, 19 N. Y. 119, 2 Keener's Cas. 1937, 1 Cum. Cas. 975; Bank of Toledo v. International Bank, 21 N. Y. 542; Buffalo & Allegany R. Co. v. Cary, 26 N. Y. 75, 1 Smith's Cas. 89, 1 Cum. Cas. 411; Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, 1 Cum. Cas. 407; Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576; United States Vinegar Co. v. Schlegal, 143 N. Y. 537.

North Carolina: Buncombe Turnpike Co. v. McCarson, 1 Dev. & B. (N. C.) 306; Tar River Nav. Co. v. Neal, 3 Hawks (N. C.) 520; Wellington & Powellsville R. Co. v. Cashie & C. Railroad & Lumber Co., 114 N. C. 690.

Ohio: Society Perun v. City of Cleveland, 43 Ohio St. 481, 1 Smith's Cas. 120, 2 Keener's Cas. 1953.

Oregon: Jones v. Hale, 32 Or. 465.

Pennsylvania: McConahy v. Centre & K. Turnpike Road Co., 1 Pen. & W. (Pa.) 426; Cochran v. Arnold, 58 Pa. St. 399; Spahr v. Farmers' Bank of Carlisle, 94 Pa. St. 429; Garrett v. Dillsburg & Mechanicsburg R. Co., 78 Pa. St. 465; Twelfth St. Market Co. v. Philadelphia & R. Terminal R. Co., 142 Pa. St. 580; Hamilton v. Clarion, Mahoning & P. R. Co., 144 Pa. St. 34; Hooven Mercantile Co. v. Evans Min. Co., 193 Pa. St. 28; Com. v. Philadelphia County, 193 Pa. St. 236; Gills' Estate, 157 Pa. St. 59, 1 Keener's Cas. 3.

South Dakota: Building & Loan Ass'n v. Chamberlain, 4 S. D. 271.

Tennessee: Augusta Mfg. Co. v. Vertrees, 4 Lea (Tenn.) 75; Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch.) 56 S. W. 35.

Texas: American Salt Co. v. Heidenheimer, 80 Tex. 344, 26 Am. St. Rep. 743; McLeary v. Dawson, 87 Tex. 524; Brennan v. City of Weatherford, 53 Tex. 330, 37 Am. Rep. 758.

Utah: Tarpey v. Deseret Salt Co., 5 Utah, 494; Marsh v. Mathias, 19 Utah, 350.

Washington: Carroll v. Pacific Nat. Bank, 19 Wash. 639.

West Virginia: Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764.

Wisconsin: Whitney v. Robinson, 53 Wis. 309; City of Ashland v. Wheeler, 88 Wis. 607; Independent Order of Foresters of Canada v. United Order of Forest-

they are the rights and franchises of a sovereign, and he alone can interpose. Until such interposition the public may treat those possessing and exercising corporate powers under color of law as doing so rightfully. The rule is in the interest of the public, and is essential to the safety of business transactions with corporations."[80]

Statutes.—In some jurisdictions this doctrine is established by express statutory provision. Thus in California it is provided that the due incorporation of any company claiming in good faith to be a corporation, and doing business as such, shall not be inquired into collaterally in any private suit to which the *de facto* corporation shall be a party.[81]

ers, 94 Wis. 234; Golonbieski v. State, 101 Wis. 333; Slocum v. Head, 105 Wis. 431; Franke v. Mann, 106 Wis. 118.

In a late case in the supreme court of New York, it was said by Judge Bradley: "A distinction between corporations having their charter directly from legislative enactment and those created pursuant to general laws is observed by the courts in some cases, where it is held that failure of the former to perform certain conditions imposed to enable them to take the benefit of the charter will not subject their corporate character to attack by third persons, while it is otherwise in respect to corporations sought to be created under general laws when there is a failure to comply fully with the conditions precedent to their creation. That distinction may be well founded so far as relates to the organization of them, as in the one case they are created by the statute and in the other their creation is authorized by it. But when, by proceedings taken for the purpose, there has been an attempt to comply with the statute under which it is sought to incorporate the company, and articles of association have been filed, it, by user as such, becomes a corporation de facto, with all the rights as to third persons which that imports, although its articles filed are in some particular defective. I see no reason why it does not then stand on the same footing as does a corporation de facto whose charter has come directly from legislative enactment, and by which certain conditions made requisite to its creation or organization have not been performed." Lamming v. Galusha, 81 Hun (N. Y.) 247. This case was affirmed by the court of appeals in 151 N. Y. 648.

In Rhode Island, this doctrine has been repudiated, and it has been there held that the corporate existence of an association suing as a corporation may always be questioned if there is no element of estoppel. Slocum v. Providence Steam & Gas Pipe Co., 10 R. I. 112, 1 Smith's Cas. 134; Slocum v. Warren, 10 R. I. 116, 1 Smith's Cas. 136.

[79] Perkins, J., in Heaston v. Cincinnati & Ft. Wayne R. Co., 16 Ind. 275, 79 Am. Dec. 430, 1 Cum. Cas. 417.

[80] Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113.

[81] See Bakersfield Town Hall Ass'n v. Chester, 55 Cal. 98; Pacific Bank v. De Ro, 37 Cal. 538; Lakeside Ditch Co. v. Crane, 80 Cal. 181; Golden Gate Mill & Min. Co. v. Joshua Hendy Machine Works, 82 Cal. 184.

§ 81. Application of the doctrine in relation to de facto corporations.

(a) In general.—With respect to the application of the doctrine in relation to *de facto* corporations, it is safe to say that it is sufficient to show a *de facto* corporate existence in almost all actions or proceedings in which the existence of a body of men as a corporation may be in issue, except in a direct proceeding by the state in *quo warranto* to question their *right* to be a corporation, and to oust them from the exercise of corporate powers.

It was said in a California case: "A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, * * * its acts are to be treated as efficacious."[82]

In a late Alabama case it was said: "Corporations may exist either *de jure,* or *de facto.* If of the latter class, they are under the protection of the same law, and governed by the same legal principles as those of the former, so long as the state acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the state, from whom is derived the right to exist as a corporation, and whose authority is usurped."[83]

[82] People v. La Rue, 67 Cal. 526, 530. And see the other cases in the different states cited in notes 77 and 78, supra.

[83] Snider's Sons' Co. v. Troy, 91 Ala. 224, 230, 24 Am. St. Rep. 887, 1 Smith's Cas. 104.

In an earlier case it was said: "The corporation must of necessity be presumed to be rightfully in possession of the franchise, and rightfully to exercise the power, which the legislative grant confers. Individual right is not invaded, if the negative is true in fact, and there is usurpation. It is the state—the sovereign—whose rights are invaded, and whose authority is usurped. The individual could not create the corporation—could not grant, define, limit its powers; and no grant of these by the sovereign can lessen his rights. There can consequent-

(b) Contracts with de facto corporations—(1) In general.—A *de facto* corporation has the same capacity as a *de jure* corporation to enter into contracts, and it is sufficient, therefore, to show a *de facto* corporate existence in order to sustain an action by or against an association as a corporation on a note, bond, or other contract,[84] or in order to defeat an action against the stockholders or members of an association as individuals on a note or other contract made by them as a corporation,[85] or an

ly be no cause of complaint by the citizen, and no right to inquire whether the corporate existence is rightful—de jure, or merely colorable." Lehman v. Warner, 61 Ala. 455.

[84] Pattison v. Albany Bldg. & Loan Ass'n, 63 Ga. 373; Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 47 Am. St. Rep. 153; Boise City Canal Co. v. Pinkham, 1 Idaho, 790; Willard v. Methodist Episcopal Church of Rockville Centre, 66 Ill. 55; Osborn v. People, 103 Ill. 224; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Cozzens v. Chicago Hydraulic-Press Brick Co., 166 Ill. 213, 215; Heaston v. Cincinnati & Ft. Wayne R. Co., 16 Ind. 275, 79 Am. Dec. 430, 1 Cum. Cas. 417; Pope v. Capital Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183; Chicago, Kansas & W. R. Co. v. Stafford County Com'rs, 36 Kan. 121; Appleton Mut. Fire Ins. Co. v. Jesser, 5 Allen (Mass.) 446; Barrett v. Mead, 100 Allen (Mass.) 337; Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264, 1 Cum. Cas. 420; Smith v. County of Clark, 54 Mo. 58; Lincoln Bldg. & Sav. Ass'n v. Graham, 7 Neb. 173; Larned v. Beal, 65 N. H. 184; Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482; Buffalo & Allegany R. Co. v. Cary, 26 N. Y. 75, 1 Cum. Cas. 411, 1 Smith's Cas. 89; Lippincott v. Shaw Carriage Co., 25 Fed. 577; Dallas County v. Huidekoper, 154 U. S. 654; Reynolds v. Myers, 51 Vt. 444; Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764.

[85] Humphreys v. Mooney, 5 Colo. 282; Duke v. Taylor, 37 Fla. 64; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; McClinch v. Sturgis, 72 Me. 288; American Salt Co. v. Heidenheimer, 80 Tex. 344, 26 Am. St. Rep. 743; Laflin & Rand Powder Co. v. Sinsheimer, 46 Md. 315, 24 Am. Rep. 522; Merchants' & Manufacturers' Bank v. Stone, 38 Mich. 779; American Mirror & Glass Beveling Co. v. Bulkley, 107 Mich. 447; Gow v. Collin & Parker Lumber Co., 109 Mich. 45; Edwards v. Cleveland Dryer Co., 83 Ill. App. 643; Doty v. Patterson (Ind.) 56 N. E. 668; Johnson v. Okerstrom, 70 Minn. 303; Cochran v. Arnold, 58 Pa. St. 399; Globe Pub. Co. v. State Bank of Nebraska, 41 Neb. 175; Kleckner v. Turk, 45 Neb. 176; Hogue v. Capital Nat. Bank of Lincoln, 47 Neb. 929; Larned v. Beal, 65 N. H. 184; Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989; Vanneman v. Young, 52 N. J. Law, 403; Bartholomew v. Bentley, 1 Ohio St. 37; Reynolds v. Myers, 51 Vt. 444; Harrod v. Hamer, 32 Wis. 162; Slocum v. Head, 105 Wis. 431; Franke v. Mann, 106 Wis. 118.

Contra, Williams v. Hewitt, 47 La. Ann. 1076.

"In the absence of a statutory provision making shareholders liable in case of failure to comply with the requirements of the charter, or with the requirements of the act under which the company is incorporated, persons who have contracted with a de facto corpo-

action against the officers making such a contract.[86] It is also sufficient to show a *de facto* corporate existence when the validity of a contract by a body of men claiming to be a corporation is in issue in a suit between third persons.[87]

——**Illustrations.**—For example, proof of a *de facto* corporate existence is all that is necessary to sustain an action on bonds given by a county or municipal corporation in aid of a railroad company, whether the action is brought by the company or by an assignee,[88] or to sustain an action by a mutual insurance company against a member to collect an assessment,[89] or an action by the indorsee of a note made payable to a corporation,[90] or an action by a corporation as indorsee of a note,[91] or an action against the indorser of a note made by a corporation,[92] or an action by a corporation on a policy of insurance.[93]

——**(2) Subscriptions to capital stock.**—The doctrine that a corporation *de facto* has the same capacity to contract and to enforce its contracts as a corporation *de jure* applies to the subscriptions to the capital stock of a corporation after its organization and assumption of corporate powers. If a person subscribes for stock in a corporation after it is organized, and not preliminary to organization, and on condition, express or implied, that he shall not be liable until complete organization and *de jure* incorporation, it is sufficient to show *de facto* corporate existence to support an action on the subscription.[94]

ration, as a corporation, cannot deny its corporate existence in order to charge its shareholders individually as partners." Runyon, Ch., in Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989.

[86] Bartholomew v. Bentley, 1 Ohio St. 37; Lamming v. Galusha, 81 Hun (N. Y.) 247, 151 N. Y. 648.

[87] New Haven Wire Co. Cases, 57 Conn. 352, 394; Smith v. Mayfield, 163 Ill. 447, 457.

[88] Douglas County Com'rs v. Bolles, 94 U. S. 104; County of Macon v. Shores, 97 U. S. 272; Dallas County v. Huidekoper, 154 U. S. 654; Smith v. County of Clark, 54 Mo. 58.

[89] Appleton Mut. Fire Ins. Co. v. Jesser, 5 Allen (Mass.) 446.

[90] Bibb v. Hall, 101 Ala. 79.

[91] Mix v. National Bank of Bloomington, 91 Ill. 20, 33 Am. Rep. 44.

[92] Pacific Bank v. De Ro, 37 Cal. 538.

[93] Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764.

[94] Heaston v. Cincinnati & Ft. Wayne R. Co., 16 Ind. 275, 79 Am. Dec. 430, 1 Cum. Cas. 417; Eaton v. Aspinwall, 19 N. Y. 119, 2 Keener's Cas. 1937, 1 Cum. Cas. 975; Buffalo & Allegany R. Co. v. Cary, 26 N. Y. 75, 1 Smith's Cas. 89, 1 Cum. Cas. 411; Hamilton v. Clarion, Mahoning & P. R. Co., 144

This is true of subscriptions by counties or other municipalities to the capital stock of a railroad company.[95]

——**(3) Statutory liability of stockholders.**—A *de facto* corporate existence is all that need be shown in order to sustain an action by a creditor of the corporation against a stockholder to enforce his statutory liability for the debts of the corporation.[96]

(c) As between members or members and officers.—It is sufficient to show a *de facto* corporate existence when the legal existence of a corporation is in issue in controveries between the members, or between the members and officers, as in a suit in equity by a minority of the stockholders against the corporation and the directors to hold them liable for and to enjoin mismanagement.[97]

(d) Conveyances and transfers to or by corporations, title to property, and actions—(1) In general.—It is well settled that a corporation *de facto* is just as capable of taking and holding property, real or personal, as a corporation *de jure,* and is just as capable of conveying or transferring property. A conveyance or transfer of property to or by a corporation *de facto,* therefore, is valid and binding as against all the world except the state, and even as against the state except in direct proceedings in *quo warranto.*[98] It follows that the title to property cannot be attacked on the ground that a corporation appearing as

Pa. St. 34; Tar River Nav. Co. v. Neal, 3 Hawks (N. C.) 520; Duke v. Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472. And see post, § 462(e).

[95] Smith v. County of Clark, 54 Mo. 58; County of Macon v. Snores, 97 U. S. 272; Dallas County v. Huidekoper, 154 U. S. 654; Chicago, Kansas & W. R. Co. v. Stafford County Com'rs, 36 Kan. 121.

[96] Wheelock v. Kost, 77 Ill. 296.

[97] Merchants' & Planters' Line v. Waganer, 71 Ala. 581, 585.

[98] Doyle v. San Diego Land & Town Co., 46 Fed. 709; Baltimore & Potomac R. Co. v. Fifth Baptist Church, 137 U. S. 568; Dannebroge Gold Quartz Min. Co. v. Allment, 26 Cal. 286; Bakersfield Town Hall Ass'n v. Chester, 55 Cal. 98; Oakland Gas Light Co. v. Dameron, 67 Cal. 663; Thompson v. Candor, 60 Ill. 244; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Farnsworth v. Drake, 11 Ind. 101; Keene v. Van Reuth, 48 Md. 184; Trustees of East Norway Lake N. E. L. Church v. Froislie, 37 Minn. 447; Catholic Church at Lexington v. Tobbein, 82 Mo. 418; Crenshaw v. Ullman, 113 Mo. 633; Finch v. Ullman, 105 Mo. 255, 24 Am. St. Rep. 383; Saunders v. Farmer, 62 N. H. 572; Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576; Society Perun v. City of Cleveland, 43 Ohio St. 481, 1 Smith's Cas. 120, 2 Keener's Cas. 1953; Augusta Mfg. Co. v.

grantee and grantor in the chain of title was a *de facto* corporation only.[99] If a corporation has a *de facto* existence, the validity of an assignment of a note to or by it cannot be attacked because of defects or irregularities in its organization.[100]

——(2) **Devise or bequest to corporation.**—A corporation *de facto* has the same capacity as a corporation *de jure*[101] to take property by devise or bequest, and its title to property so acquired cannot be defeated because of the defects or irregularities in its organization preventing it from becoming a corporation *de jure*.[102]

——(3) **Mortgages.**—A mortgage made by or to a corporation *de facto* is as valid as if it were made by or to a corporation *de jure*, and cannot be attacked on the ground of want of incorporation, either by the mortgagor or by persons claiming under him or it, or by third persons.[103]

——(4) **Actions with respect to property.**—Since a corporation *de facto* may take and hold property, it has the same right as a corporation *de jure* to maintain actions to recover or protect its property, or to recover damages for injuries by trespass or otherwise. Thus it may maintain an action of ejectment or a

Vertrees, 4 Lea (Tenn.) 75; Tarpey v. Deseret Salt Co., 5 Utah, 494; Ricketson v. Galligan, 89 Wis. 394.

Compare Harriman v. Southam, 16 Ind. 190; Hincks v. Converse, 37 La. Ann. 484.

A deed to a corporation executed before it has filed its articles of incorporation, but not delivered until afterwards, is good. Sayward v. Gardner, 5 Wash. 247. See post, § 111(a).

Indeed, it has been held that, by reason of the estoppel of the grantor, a deed to a corporation is good after its organization, although both executed and delivered before. Dyer v. Rich, 1 Metc. (Mass.) 180. See post, § 85.

[99] Thompson v. Candor, 60 Ill. 244; Keene v. Van Reuth, 48 Md. 184; Saunders v. Farmer, 62 N. H. 572; Tarpey v. Deseret Salt Co., 5 Utah, 494; Ricketson v. Galligan, 89 Wis. 394; Crenshaw v. Ullman, 113 Mo. 633; and other cases cited in the preceding note.

[100] Farnsworth v. Drake, 11 Ind. 101; Toledo & Ann Arbor R. Co. v. Johnson, 55 Mich. 456.

[101] See post, § 132 et seq.

[102] See Catholic Church at Lexington v. Tobbein, 82 Mo. 418; Quinn v. Shields, 62 Iowa, 129, 49 Am. Rep. 141. This case was under a statute.

[103] Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 47 Am. St. Rep. 153; Toledo, St. Louis & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, modifying 86 Fed. 929; Lincoln Bldg. & Sav. Ass'n v. Graham, 7 Neb. 173; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548, 558; Farmers' Loan & Trust Co. v. Toledo, Ann Arbor & N. M. R. Co., 67 Fed. 49; Lord v. Essex Bldg. Ass'n, 37 Md. 320.

suit to quiet title,[104] a suit to enjoin wrongful interference with its property or franchises,[105] a suit to enjoin a sale on an execution against another,[106] or an action to recover damages for a trespass or conversion,[107] or to enjoin or recover damages for a nuisance,[108] or to enjoin or recover damages for infringement of a patent, trademark, or copyright,[109] or to protect or obtain redress for the violation of any other right.[110]

(e) Torts by or against de facto corporations—(1) Torts by.—A *de facto* corporation is as fully liable in an action for damages for wrongs committed by it as a corporation *de jure* would be, and therefore it is only necessary to show a *de facto* corporate existence to sustain an action against a corporation for negligence causing personal injury or death, or injury to property, or for trespass, or conversion, or infringement of a patent, trademark, or copyright.[111]

——**(2) Torts against.**—As was shown in a previous section, a

[104] Bakersfield Town Hall Ass'n v. Chester, 55 Cal. 98; Oakland Gas Light Co. v. Dameron, 67 Cal. 663; Proprietors of Jeffries Neck Pasture v. Inhabitants of Ispwich, 153 Mass. 42; Saunders v. Farmer, 62 N. H. 572; Trustees of East Norway Lake N. E. L. Church v. Froislie. 37 Minn. 447; Augusta Mfg. Co. v. Vertrees, 4 Lea (Tenn.) 75.

[105] Denver & Swansea Ry. Co. v. Denver City Ry. Co., 2 Colo. 673; Cincinnati, La Fayette & C. R. Co. v. Danville & V. Ry. Co., 75 Ill. 113; Franke v. Mann, 106 Wis. 118.

[106] Dannebroge Gold Quartz Min. Co. v. Allment, 26 Cal. 286.

[107] Stockton & L. Gravel Road Co. v. Stockton & Copperpolis R. Co., 45 Cal. 680; Golden Gate Mill & Min. Co. v. Joshua Hendy Machine Works, 82 Cal. 184; Alderman v. School Directors, 91 Ill. 179; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315, 322; Bank of Manchester v. Allen, 11 Vt. 302, 307; Remington Paper Co. v. O'Dougherty, 65 N. Y. 570; Persse & Brooks Paper Works v. Willett, 19 Abb. Pr. (N. Y.) 416.

But in Doby & Union Island Tel. Co. v. De Magathias, 25 Fed. 697, it was held that where a telegraph company was organized under a void charter, a cable laid by it across a navigable river was an unauthorized obstruction, and that it could not sue to recover damages for injuries thereto.

[108] Baltimore & Potomac R. Co. v. Fifth Baptist Church, 137 U. S. 568 (noise and smoke from operations of a railroad).

[109] American Cable Ry. Co. v. City of New York, 68 Fed. 227; Young Reversible Lock-Nut Co. v. Young Lock-Nut Co., 72 Fed. 62.

[110] Where a corporation has been chartered by the legislature, and there has been a de facto organization thereof, it may sue to restrain persons from acting under an invalid organization attempted to be made thereafter by some of the original incorporators, acting without authority. Union Water Co. v. Kean, 52 N. J. Eq. 111.

[111] Persons & Brooks Paper-Works v. Willett, 19 Abb. Pr. (N. Y.) 416; Pinkerton v. Pennsylvania Traction Co., 193 Pa. St. 229.

corporation *de facto,* being capable of taking and holding property as against all the world but the state, may maintain, to the same extent as a corporation *de jure,* an action for a tort affecting its property, as an action for trespass, or conversion, or nuisance, or infringement of a patent, trademark, or copyright, etc., and in such an action by a corporation it is no defense to show that for some reason it is not a *de jure* corporation.[112]

——**(3) Liability of members.**—It has been held in Louisiana that the members of an association claiming to be a corporation must show full compliance with the statutory requirements, or, in other words, a *de jure* corporate existence, when they seek to defeat an action against them as individuals for wrongful acts (keeping a vicious animal), on the ground that such acts were corporate acts.[113] This view, however, cannot be sustained to the extent of holding members of a *de facto* corporation liable in tort for acts of officers merely because of their being members, and where they do not actually participate in or authorize the wrong. The rule must be the same as when it is sought to hold the members of a *de facto* corporation liable on contracts made by the corporation.[114] Of course officers and members of a *de facto* corporation who participate in wrongful acts by the corporation are personally liable, as well as the corporation, but this is true also in the case of a *de jure* corporation.[115]

(f) Judgment against de facto corporations.—A judgment rendered in an action against a *de facto* corporation, or confessed by such a corporation, has the same binding effect as if it were a *de jure* corporation. Therefore, where a corporation, after an

[112] Ante, § 81(d)(4); Baltimore & Potomac R. Co. v. Fifth Baptist Church, 137 U. S. 568; Stockton & L. Gravel Road Co. v. Stockton & Copperopolis R. Co., 45 Cal. 680; Golden Gate Mill & Min. Co. v. Joshua Hendy Machine Works, 82 Cal. 184; Elizabeth City Academy v. Lindsey, 6 Ired. (N. C.) 476, 45 Am. Dec. 500; Remington Paper Co. v. O'Dougherty, 65 N. Y. 570; Persse & Brooks Paper-Works v. Willett, 19 Abb. Pr. (N. Y.) 416; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315, 322; Bank of Manchester v. Allen, 11 Vt. 302, 307; Alderman v. School Directors, 91 Ill. 179. Compare, however, Doboy & Union Island Tel. Co. v. De Magathias, 25 Fed. 697.

[113] Vredenburg v. Behan, 33 La. Ann. 635.

[114] Ante, § 81(b).

[115] See post, chapter xxiv.

imperfect organization, contracts a debt, and a judgment is rendered therefor, and it afterwards perfects its organization, so as to be a corporation *de jure,* and then executes a mortgage on its property, the lien of the judgment is prior to the lien of the mortgage.[116]

(g) Crimes against de facto corporations.—Criminal offenses may be committed against corporations *de facto* to the same extent as they may be committed against corporations *de jure.* It is settled, therefore, that it is only necessary to show a *de facto* corporate existence in a criminal prosecution for an offense against a corporation, as in a prosecution for destroying a vessel or burning other property with intent to defraud an insurance company,[117] or for forging or counterfeiting a note of a banking company,[118] or for forgery with intent to defraud a corporation,[119] or for obstructing the road of a railroad company,[120] or, generally, for larceny, robbery, or embezzlement, fraud, malicious mischief, or other offenses against the property of a corporation.[121]

(h) Right to exercise special franchises—In general.—The doctrine that the right of a corporation *de facto* to exercise corporate powers cannot be collaterally questioned applies only to the right to be and act as a corporation, and does not prevent a person from showing that a corporation has no right to exercise other franchises than that of being a corporation, not because it is not a corporation capable of exercising such franchises,

[116] Bergen v. Porpoise Fishing Co., 41 N. J. Eq. 238.

[117] United States v. Amedy, 11 Wheat. (U. S.) 392; People v. Hughes, 29 Cal. 257; People v. Schwartz, 32 Cal. 160; State v. Byrne, 45 Conn. 273.

[118] State v. Carr, 5 N. H. 367; People v. Ah Sam, 41 Cal. 645; Reed v. State, 15 Ohio, 217. But see State v. Newland, 7 Iowa, 242, 71 Am. Dec. 444; Trice v. State, 2 Head (Tenn.) 591; State v. Murphy, 17 R. I. 698; De Bow v. People, 1 Denio (N. Y.) 9.

[119] State v. Shaw, 92 N. C. 768; People v. Frank, 28 Cal. 507; State v. Jackson, 90 Mo. 156.

[120] Com. v. Bakeman, 105 Mass. 53.

[121] People v. Barrie, 49 Cal. 342; People v. Leonard, 106 Cal. 302; People v. Oldham, 111 Cal. 648; Calkins v. State, 18 Ohio St. 366, 98 Am. Dec. 121; Smith v. State, 28 Ind. 321; White v. State, 69 Ind. 273; People v. Chadwick, 2 Park. Cr. R. (N. Y.) 163; Fleener v. State, 58 Ark. 98; Norton v. State, 74 Ind. 337; State v. Cheek, 63 Mo. 364; State v. Habib, 18 R. I. 558; Edelhoff v. State, 5 Wyo. 19; Golonbies Ki v. State, 107 Wis. 333.

but because the right to exercise them is for some reason not vested in it. For example, a person may attack the right of a *de facto* bridge company to take tolls on the ground that the period for which the right to take tolls was granted to it by the county or state has expired. This is not in any sense an attack on its right to exist and act as a corporation, for it may be a corporation, and yet not be entitled to exercise the franchise of taking tolls.[122]

It must not be supposed from this, however, that there can be a collateral attack on the *existence* of a corporation because it exercises franchises granted by the state or a municipality. A corporation *de facto* has the same capacity to exercise a franchise as it has to take and hold property,—the same capacity, in other words, as a corporation *de jure*,—and its right to exercise a franchise cannot be questioned merely on the ground that it is only a corporation *de facto*.

——**Illustrations.**—Thus, a corporation *de facto* may construct and maintain a railroad,[123] and sue to enjoin others from interfering with its franchise.[124] A *de facto* navigation, bridge, or toll-road company may take and sue to collect tolls.[125] A *de facto* corporation having the exclusive franchise of furnishing a municipality and its inhabitants with water may exercise such franchise and sue to enjoin interference or usurpation by oth-

[122] Grand Rapids Bridge Co. v. Prange, 35 Mich. 400.

[123] That a railroad company cannot be enjoined or prevented from constructing its road because of defects in its organization, if it is a de facto corporation, see Aurora & Cincinnati R. Co. v City of Laurenceburgh, 56 Ind. 80; Attorney General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; National Docks Ry. Co. v. Central R. Co., 32 N. J. Eq. 755; Twelfth St. Market Co. v. Philadelphia & R. Terminal R. Co., 142 Pa. St. 580.

A de facto street railroad company cannot be enjoined from laying its tracks in the street, at the suit of an abutting property owner, on the ground of defects in its organization. Nichols v. Ann Arbor & Y. St. Co., 87 Mich. 361. And see Williams v. Citizens' Ry. Co., 130 Ind. 71, 30 Am. St. Rep. 201.

[124] Denver & Swansea Ry. Co. v. Denver City Ry. Co., 2 Colo. 673.

[125] Pontiac & L. Plank-Road Co. v. Hilton, 69 Mich. 115; Canal Street Gravel Road Co. v. Paas, 95 Mich. 372; Duke v. Cahawba Nav. Co., 10 Ala. 82, 16 Ala. 372. This was assumed to be the law in Grand Rapids Bridge Co. v. Prange, 35 Mich. 400. See, also, Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 345.

ers.[126] The same is true of a *de facto* gas-light corporation,[127] and of a *de facto* corporation having the exclusive franchise of maintaining a toll bridge.[128]

A *de facto* canal company cannot be enjoined from constructing its canal merely because of its not being a corporation *de jure*.[129] Nor can a *de facto* municipal corporation be enjoined from levying and collecting taxes because of its defective incorporation.[130]

(i) **Eminent domain.**—According to the better opinion, the rule that *de facto* corporate existence is sufficient as against every person but the state is as applicable in proceedings by a corporation to take land under the power of eminent domain as in the cases above mentioned, and it is not necessary in such proceedings that it shall show that it is a *de jure* corporation.[131] Some courts, however, have taken a contrary view, and have held that in such a case a *de jure* corporate existence must be shown.[132]

(j) **Assessments or taxes for benefits.**—There is also a conflict of opinion as to whether it is sufficient to show a *de facto* corporate existence when a corporation seeks, under statutory authority, to collect assessments or taxes against property for benefits resulting from the construction of its works, as in the case of in-

[126] Union Water Co. v. Kean, 52 N. J. Eq. 111. See, also, City of Ashland v. Wheeler, 88 Wis. 607.

[127] Elizabethtown Gas Light Co. v. Green, 46 N. J. Eq. 118, 49 N. J. Eq. 329.

[128] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344.

[129] Society for Establishing Useful Manufactures v. Morris Canal & Banking Co., 1 N. J. Eq. 157.

[130] Trumbo v. People, 75 Ill. 562; Mullikin v. City of Bloomington, 72 Ind. 161; Atchison, Topeka & S. F. R. Co. v. Wilson, 33 Kan. 223; Kayser v. Trustees of Bremen, 16 Mo. 88; Stamper v. Roberts, 90 Mo. 683.

[131] Wellington & Powellsville R. Co. v. Cashie & C. Railroad & Lumber Co., 114 N. C. 690; McAuley v. Columbus, Chicago & I. C. Ry. Co., 83 Ill. 348; Peoria & P. U. Ry. Co. v. Peoria & F. Ry. Co., 105 Ill. 110; Thomas v. St. Louis, Belleville & S. Ry. Co., 164 Ill. 634; Henry v. Centralia & Chester R. Co., 121 Ill. 264; Morrison v. Forman, 167 Ill. 427; Aurora & Cincinnati R. Co. v. Miller, 56 Ind. 88; Reisner v. Strong, 24 Kan. 410; Nieweyer v. Little Rock Junction Railway, 43 Ark. 111.

[132] It has been so held in Ohio, Atlantic & Ohio R. Co. v. Sullivant, 5 Ohio St. 276; Atkinson v. Marietta & Cincinnati R. Co., 15 Ohio St. 21; Powers v. Hazelton & Letonia R. Co., 33 Ohio St. 429; and in Missouri, Orrick School Dist. v. Dorton, 125 Mo. 439; St. Joseph & Iowa R. Co. v. Shambaugh, 106 Mo. 557; and in New York, In re Brooklyn, Winfield & Newton Ry. Co., 72 N. Y. 245; In re Broadway & Seventh Ave. R. Co., 73 Hun (N. Y.) 7.

corporated drainage and reclamation districts or companies, turnpike companies, and the like. Some courts hold that it is necessary to show that the corporation has complied with all conditions precedent in its organization, and is a corporation *de jure*,[133] while others hold that it need only show that it is a corporation *de facto*.[134]

(k) Proceedings by or against the state.—All the courts agree that in a direct proceeding by the state to question the right of an association to be a corporation, and to oust it from the exercise of corporate powers, it is necessary for the association to show that it is a corporation *de jure;* and to show this, it must show not only that there is a valid law under which it might be a corporation, and that there has been an attempt to organize as a corporation under the law, but also that all the requirements of the law intended as conditions precedent have been substantially complied with.[135] It is not necessary, however, to show a *de jure* corporate existence, even as against the state, when the existence of a corporation is collaterally attacked, as in a suit against the state on a claim in favor of the corporation.[136]

(l) Effect of ouster in proceedings by the state.—Since a corporation *de facto* is a reality, and has an actual and substantial legal existence, subject only to the right of the state to oust it from the exercise of corporate powers in a direct proceeding brought for that purpose, it follows that a judgment of ouster in such a proceeding does not relate back so as to affect the validity of transfers or other acts done or contracts made by it before its corporate existence was questioned. As to such acts, the rules in relation to *de facto* corporations apply notwithstanding the judgment of ouster.[137] For this reason, when a corporation *de*

[133] Knight v. Flatrock & W. Turnpike Co., 45 Ind. 134; Piper v. Rhodes, 30 Ind. 309; McIntire v. McLain Ditching Ass'n, 40 Ind. 104; Busenback v. Attica & B. Gravel Road Co., 43 Ind. 265; Newton County Draining Co. v. Nofsinger, 43 Ind. 566.

[134] Osborn v. People, 103 Ill. 224; Evans v. Lewis, 121 Ill. 478; Dean v. Davis, 51 Cal. 406, 411; Quint v. Hoffman, 103 Cal. 506; Reclamation Dist. No. 542 v. Turner, 104 Cal. 334.

[135] See post, § 93 et seq.

[136] Coxe v. State, 144 N. Y. 396; People v. La Rue, 67 Cal. 530; North v. State, 107 Ind. 356.

[137] Society Perun v. City of Cleveland, 43 Ohio St. 481, 2 Keener's Cas. 1953; American Salt Co. v. Heidenheimer, 80 Tex. 344,

facto has been ousted from the franchise of being a corporation in *quo warranto* proceedings by the state, such ouster is no defense to a suit by a creditor of the corporation against stockholders to enforce payment of their subscriptions.[138] It is otherwise, of course, with respect to acts done after such judgment.

§ 82. Essentials of a de facto corporate existence.

(a) In general.—There has been so much conflict in the decisions of the different courts with respect to what is sufficient to give a body of men the status of a *de facto* corporation, that it is not possible to formulate definite rules on the subject which will apply in all the states. On some points, the decisions in the different states are in direct conflict. Indeed, on some points it is difficult, if not impossible, to reconcile the decisions in the same state. As we shall see in the following paragraphs, some courts have held that there may be a corporation *de facto* without a valid law authorizing it. Some have held, or seem to have held, that it is not necessary that there shall have been any organization or attempt to organize under the law, but that mere user of corporate powers is sufficient. Some, while requiring an attempt to organize, have held that there need not be even a colorable compliance with conditions precedent prescribed by the legislature; and others have held that all conditions precedent must be substantially complied with.

——**Proper rule as to essentials.**—All of these propositions, however, are unsound. The true doctrine is to the effect that an association is a corporation *de facto,* and therefore within the principles stated and explained in the preceding sections whenever there is—

(1) A valid charter or law under which a corporation with the powers assumed by the association in question might exist.

(2) A *bona fide* attempt to organize as a corporation under such charter or law.

(3) A colorable or apparent compliance with such require-

36 Am. St. Rep. 743; Gaff v. St. 269; Farnsworth v. Drake, 11 Flesher, 33 Ohio St. 107; Rowland Ind. 101.
v. Meader Furniture Co., 38 Ohio [138] Rowland v. Meader Furniture

ments of the charter or law as are intended by the legislature as conditions precedent to corporate existence.

(4) Followed by the exercise or user of corporate powers.

In other words: "Where it is shown that there is a charter or a law under which a corporation with the powers assumed might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence of a corporation *de facto* is established."[139] "Where the law authorizes a corporation, and there has been an attempt in good faith to organize, and corporate functions are thereafter exercised, there exists a corporation *de facto,* the legal existence of which cannot ordinarily be called in question collaterally."[140] "A corporation *de facto* presupposes a charter, or a law authorizing the creation of such a corporation, that there has been an attempt in good faith to comply with its provisions, and that there has been user or the exercise of corporate powers under it."[141]

(b) Elements of estoppel not necessary.—In some of the cases, the doctrine in relation to *de facto* corporations has been confused with the doctrine, to be presently explained, in relation to estoppel to deny corporate existence, and it seems to have been assumed that the existence of a *de facto* corporation may be col-

Co., 38 Ohio St. 269; Gaff v. Flesher, 33 Ohio St. 107, 115.

[139] Stout v. Zulick, 48 N. J. Law, 599, 601, 1 Cum. Cas. 989.

[140] Haas v. Bank of Commerce, 41 Neb. 754, 757.

[141] Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113. See, also, Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co., 82 Fed. 642; Stockton & L. Gravel Road Co. v. Stockton & Copperopolis R. Co., 45 Cal. 680; Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 47 Am. St. Rep. 153; Cincinnati, La Fayette & C. R. Co. v. Danville & V. Ry. Co., 75 Ill. 113; Williamson v. Kokomo Bldg. & Loan Fund Ass'n, 89 Ind. 389; Doty v. Patterson (Ind.) 56 N. E. 668; Laflin & Rand Powder Co. v. Sinsheimer, 46 Mich. 315, 24 Am. Rep. 522; Keene v. Van Reuth, 48 Md. 184; Montgomery v. Forbes, 148 Mass. 249, 2 Keener's Cas. 1945, 1 Smith's Cas. 94, 1 Cum. Cas. 69; Eaton v. Walker, 76 Mich. 579; Trustees of East Norway Lake N. E. L. Church v. Froislie, 37 Minn. 447; Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 2 Keener's Cas. 1949, 1 Smith's Cas. 87; Johnson v. Okerstrom, 70 Minn. 303; State v. Byrne, 45 Conn. 273; Eaton v. Aspinwall, 19 N. Y. 119, 2 Keener's Cas. 1937, 1 Cum. Cas. 975; Lamming v. Galusha, 81 Hun (N. Y.) 247, 151 N. Y. 648; Society Perun v. City of Cleveland, 42 Ohio St. 481, 1 Smith's Cas. 120, 2 Keener's Cas. 1953; Jones v. Hale, 32 Or. 465; Gibb's Estate, 157 Pa. St. 59, 1 Keener's Cas. 3;

laterally questioned by an individual, unless he has dealt with the association as a corporation, and thereby estopped himself to deny its corporate character.[142] This, however, is clearly erroneous. The doctrine in relation to *de facto* corporations is based upon the ground that it would be contrary to public policy to permit a collateral attack upon the corporate existence of a body of men assuming to act as a corporation under a valid law, and after a colorable or apparent organization under the law, and does not require the existence of any element of estoppel. The fact that a person has not estopped himself by dealing with a corporation *de facto* does not entitle him to collaterally attack its existence as a corporation, for a corporation *de facto* has an *actual* existence, and *is a corporation* in contemplation of the law, as against every person except the state, and even as against the state except in a direct proceeding to question its corporate existence.[143]

"The theory that a *de facto* corporation has no real existence,

Marsh v. Mathias, 19 Utah, 350; Evenson v. Ellingson, 67 Wis. 634; McLeary v. Dawson, 87 Tex. 524; Carpenter v. Frazer, 102 Tenn. 462; Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch.) 56 S. W. 35.

[142] See Bates v. Wilson, 14 Colo. 140, 158; Wheelock v. Kost, 77 Ill. 296; Heaston v. Cincinnati & Ft. Wayne R. Co., 16 Ind. 275, 79 Am. Dec. 430, 1 Cum. Cas. 417; Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264, 1 Cum. Cas. 420.

Thus, in a New Jersey case it was said: "In the absence of a statutory provision making shareholders liable in case of failure to comply with the requirements of the charter, or with the requirements of the act under which the company is incorporated, persons who have contracted with a de facto corporation, as a corporation, cannot deny its corporate existence in order to charge its shareholders individually as partners." Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989.

Immediately afterwards, however, the court goes on to say, after defining the essentials of a de facto corporation: "And it is entirely settled that the corporate existence of such corporation de facto cannot be inquired into collaterally. * * * The legality of its corporate existence may be inquired into by the state, but not by any one else." The court thus clearly shows that it did not intend to say that any element of estoppel was necessary to prevent a person from collaterally attacking the existence of a corporation de facto.

[143] Society Perun v. City of Cleveland, 43 Ohio St. 481, 1 Smith's Cas. 120, 2 Keener's Cas. 1953; Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 47 Am. St. Rep. 153; Snider's Sons' Co. v. Troy, 91 Ala. 224, 230, 24 Am. St. Rep. 887, 1 Smith's Cas. 104; Trustees of East Norway Lake N. E. L. Church v. Froislie, 37 Minn. 447; Buffalo & Allegany R. Co. v. Cary, 26 N. Y. 75, 1 Smith's Cas. 89, 1 Cum.

that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, *a corporation.*"[144]

——**Illustrations.**—Thus the maker of a note, though there is clearly no principle of law which would estop him from denying the corporate existence of an association to which the payee might indorse the note without his consent,[145] cannot question its capacity to sue on the note as a corporation, if it is a *de facto* corporation.[146] In like manner, though there may be no elements of estoppel, it has been held that a junior mortgagee cannot attack the existence of a *de facto* corporation to which a prior mortgage has been executed.[147]

Among other cases in which it has been held that the existence of a *de facto* corporation cannot be attacked, though there are no elements of estoppel, are cases in which an attack is made on the right of a *de facto* corporation to condemn land under the power of eminent domain,[148] or to collect assessments for benefits,[149] or to build a railroad or canal, or take tolls, or exercise the exclusive franchise of maintaining a bridge, or water or gas works, etc.[150]

Cas. 411; People v. La Rue, 67 Cal. 526; Kleckner v. Turk, 45 Neb. 188; Haas v. Bank of Commerce, 41 Neb. 754; New Haven Wire Co. Cases, 57 Conn. 352, 394; Smith v. Mayfield, 163 Ill. 447, 457; Doty v. Patterson (Ind.) 56 N. E. 668.

[144] Society Perun v. City of Cleveland, 43 Ohio St. 481, 490, 1 Smith's Cas. 120, 2 Keener's Cas. 1953.

"This rule [concerning de facto corporations] is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization." Judge Mitchell, in Trustees of East Norway Lake N. E. L. Church v. Froislie, 37 Minn. 447, 451.

[145] Marion Sav. Bank v. Dunkin, 54 Ala. 471. And see post, § 92 et seq.

[146] Haas v. Bank of Commerce, 41 Neb. 754.

[147] Williamson v. Kokomo Bldg. & Loan Fund Ass'n, 89 Ind. 389.

[148] Ante, § 81(i).

[149] Ante, § 81(j).

[150] Ante, § 81(h).

(c) Lawful authority for existence of corporations—(1) In general.—In some of the cases it has been held that a corporation *de facto* may exist without any authority at all from the legislature,[151] and in some it is so assumed by *dictum* to the effect that such a corporation exists whenever there is a colorable or apparent organization, followed by the exercise or user of corporate powers.[152] This view, however, cannot be sustained, and is opposed to the decided weight of authority. In order that there may be a *de facto* corporation, there must be an apparent right, and therefore there must be some authority of law under which, except for defects and irregularities in organization, there might be a *de jure* corporation. To hold otherwise would allow persons to organize as a corporation, and do business in that privileged manner as against every person except the state, without any legislative sanction whatever. This they cannot do. Neither a corporation *de facto* nor a corporation *de jure* can exist except by or under authority, or color of authority, from the state.

"To be a corporation *de facto,*" it was said in a Wisconsin case, "it must be possible to be a corporation *de jure,* and acts done in the former case must be legally authorized to be done in the latter, or they are not protected or sanctioned by the law. Such acts must have an apparent right."[153] And in a Georgia case it was said: "Where there cannot lawfully be a corporation *de jure,* there cannot be one *de facto.*"[154]

[151] Lincoln Bldg. & Sav. Ass'n v. Graham, 7 Neb. 173; Catholic Church at Lexington v. Tobbein, 82 Mo. 418; City of St. Louis v. Shields, 62 Mo. 247. And see Smith v. Sheeley, 12 Wall. (U. S.) 358; McClinch v. Sturgis, 72 Me. 288. But see Bradley v. Reppell, 133 Mo. 545, 1 Smith's Cas. 127.

[152] See Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120, 133; Willard v. Methodist Episcopal Church of Rockville Center, 66 Ill. 55; Lakeside Ditch Co. v. Crane, 80 Cal. 181; Osborn v. People, 103 Ill. 224; Appleton Mut. Fire Ins. Co. v. Jesser, 5 Allen (Mass.) 446; Buffalo & Allegany R. Co. v. Cary, 26 N. Y. 75, 1 Smith's Cas. 89, 1 Cum. Cas. 411.

[153] Evenson v. Ellingson, 67 Wis. 634.

[154] Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 315, 47 Am. St. Rep. 153. See, also, Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co., 82 Fed. 642; Brandenstein v. Hoke, 101 Cal. 131; Jones v. Aspen Hardware Co., 21 Colo. 263, 269; Taylor v. Branham, 35 Fla. 297, 48 Am. St. Rep. 249; Duke v. Taylor, 37 Fla. 64; American Loan & Trust Co. v. Minnesota & N. W. R. Co., 157 Ill. 641, 651; Harriman v. Southam, 16 Ind. 190; Snyder v. Studebaker, 19 Ind. 462, 81 Am.

——(2) **Organization under an unconstitutional statute.**—It would follow necessarily from this principle that there cannot be a corporation *de facto* under a statute which is unconstitutional, for an unconstitutional statute is absolutely void, and though there are decisions to the contrary,[155] the better opinion is in support of this view.[156] An unconstitutional law is absolutely void, and "a void law is no law."[157] Therefore, if it be conceded that there cannot be a *de facto* corporation without some charter or law authorizing such a corporation, it must necessarily follow that there cannot be a *de facto* corporation under an unconstitutional statute.

It has been held, however, in a state in which this view is taken, that the fact that the particular statute under which it is attempted to organize a corporation is unconstitutional does not prevent its existence as a corporation *de facto* under another statute, which is constitutional, and under which it might have been organized.[158]

Dec. 415, 1 Smith's Cas. 117; Indiana Bond Co. v. Ogle, 22 Ind. App. 593; Burton v. Schildbach, 45 Mich. 504; Eaton v. Walker, 76 Mich. 579; Bradley v. Reppell, 133 Mo. 545, 1 Smith's Cas. 127; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; Hill v. Beach, 12 N. J. Eq. 31; Davis v. Stevens, 104 Fed. 235. And see Pettis v. Atkins, 60 Ill. 454; People v. Hamill, 134 Ill. 666.

[155] City of St. Louis v. Shields, 62 Mo. 247; Catholic Church at Lexington v. Tobbeln, 82 Mo. 418; Richards v. Minnesota Sav. Bank, 75 Minn. 196; Lincoln Bldg. & Sav. Ass'n v. Graham, 7 Neb. 173; Coxe v. State, 144 N. Y. 396; Hudson v. Green Hill Seminary Corp., 113 Ill. 618. And see Smith v. Sheeley, 12 Wall. (U. S.) 358; McClinch v. Sturgis, 72 Me. 288; King v. Philadelphia Co., 154 Pa. St. 160, 35 Am. St. Rep. 817; Com. v. Philadelphia County, 193 Pa. St. 236. But see Bradley v. Reppell, 133 Mo. 545, 1 Smith's Cas. 127. Compare Winget v. Quincy Bldg. & Homestead Ass'n, 128 Ill. 67, and People v. Hamill, 134 Ill. 666.

In a late Wisconsin case, a corporation whose original charter had expired was held to be a corporation de facto under an unconstitutional statute renewing its charter. Black River Imp. Co. v. Holway, 85 Wis. 344. See, however, Evenson v. Ellingson, 67 Wis. 634.

[156] City & County of San Francisco v. Spring Valley Water Works, 48 Cal. 493; Brandenstein v. Hoke, 101 Cal. 131; Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 47 Am. St. Rep. 153; Duboy & Union Island Tel. Co. v. De Magathias, 25 Fed. 697; Green v. Graves, 1 Doug. (Mich.) 351; Hurlbut v. Britain, 2 Doug. (Mich.) 191; Burton v. Schildbach, 45 Mich. 504; Skinner v. Wilhelm, 63 Mich. 568; Eaton v. Walker, 76 Mich. 579. And see People v. Hamill, 134 Ill. 666; De Bow v. People, 1 Denio (N. Y.) 9.

[157] Brandenstein v. Hoke, 101 Cal. 131. And see Norton v. Shelby County, 118 U. S. 442.

[158] Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co.,

——**(3) Variance in object or character of corporation.**—Since a corporation cannot exist *de facto* in the absence of a law authorizing it, an association for a particular purpose, or of a particular character, is not a *de facto* corporation, when the statute under which it claims the right to corporate existence authorizes corporations for some other purpose only, or of some other character only.[159]

——**(4) Expiration of charter.**—In some states, corporations continuing to exercise corporate powers after the expiration of their charter have been recognized as corporations *de facto*, on the ground that there is color of authority, and it has been held that no person except the state can question their corporate existence.[160] By the weight of authority, however, a corporation is dissolved and ceases to exist when its charter expires, unless there is some statutory provision to the contrary, for there is no longer any law under which it can exist, and therefore it cannot, after expiration of its charter, be a corporation either *de jure* or *de facto*. According to this view, its right to exercise corporate powers, including the right to sue as a corporation, may be questioned collaterally.[161]

94 Ga. 306, 47 Am. St. Rep. 153. In this case it was held that a railroad company might be regarded as a de facto corporation under a general law under which it might have been organized, and which was constitutional, although it was in fact organized under an unconstitutional special charter.

[159] Thus it was held in a Louisiana case that a rifle club organized under a statute authorizing corporations for scientific purposes only was not a corporation de facto, as the purpose was not within the statute. Vredenburg v. Behan, 33 La. Ann. 635. See, also, Indiana Bond Co. v. Ogle, 22 Ind. App. 593; Davis v. Stevens, 104 Fed. 235. Compare, however, Foster v. Moulton, 35 Minn. 458.

And in a Wisconsin case it was held that an attempt to organize a corporate body composed of two churches did not create a corporation de facto under a statute authorizing a corporation composed of one church only. Evenson v. Ellingson, 67 Wis. 634, 645.

[160] Miller v. Newburg Orrel Coal Co., 31 W. Va. 836, 2 Keener's Cas. 1929 (see note following); Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 71, 1 Smith's Cas. 112.

[161] Bradley v. Reppell, 133 Mo. 545, 1 Smith's Cas. 127; Krutz v. Paola Town Co., 20 Kan. 397; Marysville Inv. Co. v. Munson, 44 Kan. 491; Sturges v. Vanderbilt, 73 N. Y. 384; Dobson v. Simonton, 86 N. C. 492; Asheville Division No. 15, Sons of Temperance, v. Aston, 92 N. C. 578; La Grange & Memphis R. Co. v. Rainey, 7 Cold. (Tenn.) 420; White v. Campbell, 5 Humph. (Tenn.) 38; Brookville & G. Turnpike Co. v. McCarty, 8 Ind. 392, 65 Am. Dec. 768; Guaga Iron Co. v. Dawson, 4 Blackf.

——(5) **Assignment of charter.**—Where a charter is assigned by the persons to whom it is granted before any organization under it, the assignment is void, and the assignees do not acquire existence as a *de facto* corporation by organizing under it and assuming corporate powers.[162]

——(6) **Unauthorized consolidation.**—It would seem that the rule that there can be no *de facto* corporation in the absence of lawful authority, or, in other words, that there cannot be a *de facto* corporation where there cannot be a corporation *de jure*, applies to an unauthorized consolidation of corporations, and so it has been held in Illinois.[163] It has been held, however, by a federal court, that in such a case there is no want of authority for a *de jure* corporation, but a mere want of capacity in the constituent elements of which the consolidated corporation is formed, and that the consolidated corporation, therefore, may have a *de facto* existence, notwithstanding the consolidation is unauthorized.[164]

——(7) **Corporations prohibited by statute or contrary to public policy.**—When the existence of a particular corporation, or of corporations for a particular purpose, is prohibited by a positive law, or is contrary to public policy, such a corporation cannot be recognized as having a *de facto* existence. The existence of such a corporation, and its right to exercise corporate powers, may be attacked collaterally as well as directly, and by individuals as

(Ind.) 202; Morgan v. Lawrenceburg Ins. Co., 3 Ind. 285; Supreme Lodge, Knights of Pythias, v. Weller, 93 Va. 605. And see Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585. See, also, post, § 305.

In West Virginia, where a statute provided in effect that when the charter of a corporation should expire, or it should be dissolved, suits might be brought, continued or defended, property conveyed, and all lawful acts be done in the corporate name in the like manner and with like effect as before such dissolution or expiration, so far as necessary to wind up its affairs, it was held that a corporation continuing in business and committing a tort after expiration of the term of its existence as limited in its charter could not set up the expiration of its charter to defeat an action against it for the tort. Miller v. Newburg Orrel Coal Co., 31 W. Va. 836, 2 Keener's Cas. 1929.

[162] Welch v. Old Dominion Min. & Ry. Co., 10 N. Y. Supp. 174.

[163] American Loan & Trust Co. v. Minnesota & N. W. R. Co., 157 Ill. 641.

[164] Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co., 82 Fed. 642.

well as by the state.[165] "A *de facto* corporation can never be recognized in violation of a positive law.[166]

(d) Bona fide attempt to organize.—In some cases it has been held or assumed that, in order to establish *de facto* corporate existence, it is only necessary to show the exercise or user of corporate powers under color of authority from the state, and that there need not have been any attempt to organize in compliance with the law.[167] This, however, is not the law. To give an association the status of a corporation *de facto,* it is not enough to show merely that there is a statute under which they might have become incorporated, and that they have agreed among themselves to act, and have acted, as a corporation; but, in addition to this, there must have been, at the very least, a *bona fide* attempt to organize as a corporation under the statute.[168]

[165] United States v. Insurance Cos., 22 Wall. (U. S.) 99; Jones v. Aspen Hardware Co., 21 Colo. 263; Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 314, 47 Am. St. Rep. 153; Workingmen's Accommodation Bank v. Converse, 29 La. Ann. 369; St. Louis Colonization Ass'n v. Hennessy, 11 Mo. App. 555; Chicora Co. v. Crews, 6 S. C. 243; McGrew v. City Produce Exchange, 85 Tenn. 572, 4 Am. St. Rep. 771; Empire Mills v. Alston Grocery Co., 4 Willson, Civ. Cas. Ct. App. (Tex.) § 221. And see Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 10 Sawy. (U. S.) 464, 22 Fed. 245, 23 Fed. 232, 241, 27 Fed. 277.

Contra, Lincoln Bldg. & Sav. Ass'n v. Graham, 7 Neb. 173. See, also, ante, § 47(c).

[166] Jones v. Aspen Hardware Co., 21 Colo. 263, 269.

Thus, in McGrew v. City Produce Exchange, 85 Tenn. 572, 4 Am. St. Rep. 771, it was held that a pretended corporation organized for the ostensible purpose of dealing in grain, but with the real object of illegally gambling in futures, was not a corporation de facto.

It was held, however, in a late federal case, that the existence of a corporation could not be collaterally attacked in a suit by it to enforce a private right on the ground that it was a trust, and therefore illegal. American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, 90 Fed. 608.

[167] Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 47 Am. St. Rep. 153; Osborn v. People, 103 Ill. 224; Appleton Mut. Fire Ins. Co. v. Jesser, 5 Allen (Mass.) 446; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 185; Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, 1 Cum. Cas. 407.

[168] Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 1 Smith's Cas. 87, 2 Keener's Cas. 1949. And see Gartside Coal Co. v. Maxwell, 22 Fed. 197; Montgomery v. Forbes, 148 Mass. 249, 1 Cum. Cas. 69, 1 Smith's Cas. 94, 2 Keener's Cas. 1945; People v. Volcano Canyon Toll-Road Co., 100 Cal. 87; Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151; Oroville & Virginia R. Co. v. Plumas County Sup'rs, 37 Cal. 354; Jones v. Aspen Hardware Co., 21 Colo. 263, 269; McLennan v. Hopkins, 2 Kan. App. 260; Eaton v. Walker, 76 Mich. 579; Johnson v. Corser,

It was said in a Minnesota case: "To give a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a *de facto* corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation."[169]

(c) Effect of fraud—(1) Special charters.—If a special charter is obtained from the legislature by false and fraudulent representations, the state may obtain a judgment of forfeiture in direct proceedings for that purpose, but the fraud is no ground for a collateral attack upon the existence of the corporation and its exercise of corporate powers. Notwithstanding the fraud, it is a corporation *de facto*.[170] It is otherwise, however, when persons not named as corporators in a special charter fraudulently attempt to organize and exercise corporate powers under it.

This distinction is well illustrated by a New Jersey case, in which persons who had obtained control of a special charter creating a corporation to be located in Trenton, but who were not

34 Minn. 355, 1 Smith's Cas. 100; Hill v. Beach, 12 N. J. Eq. 31; Booth v. Wonderly, 36 N. J. Law, 250; Allen v. Long, 80 Tex. 261, 26 Am. St. Rep. 735; Bash v. Culver Gold Min. Co., 7 Wash. 122.

In Eaton v. Walker, 76 Mich. 579, 585, Judge Long said: "Two things are necessary to be shown in order to establish a corporation de facto, viz.: 1. The existence of a charter or some law under which a corporation, with the powers assumed, might lawfully be created. 2. A user by the party to the suit of the rights claimed to be conferred by such charter or law." In the very next sentence, however, he goes on to say: "If the law exists, and the record exhibits a bona fide attempt to organize under it, very slight evidence of user beyond this is all that can be required."

[169] Per Gilfillan, C. J., in Finnegan v. Noerenberg, 52 Minn. 239, 243, 38 Am. St. Rep. 552, 2 Keener's Cas. 1949, 1 Smith's Cas. 87.

An unincorporated bank exclusively owned by one person was held not to be a corporation de facto, although the business was conducted by a president and cashier. Longfellow v. Barnard, 58 Neb. 612.

[170] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 345, 371; Duke v. Cahawba Nav. Co., 10 Ala. 82, 16 Ala. 372; Pattison v. Albany Bldg. & Loan Ass'n, 63 Ga. 373. And see Paterson v. Arnold, 45 Pa. St. 410; All Saints Church v. Lovett, 1 Hall (N. Y.)

named as corporators therein, attempted to use it to establish a corporation to be located at Jersey City. The court said that the company had some semblance of a corporation in name, form of organization, and assumption of a seal, yet not enough to give it a *de facto* corporate existence. The attempt to establish the company in Jersey City, it was said, was a palpable and entire perversion of the act, and a fraud upon the act, and could not give corporate color to the company.[171]

——**(2) Organization under general laws.**—As was stated in a former section, to constitute a *de facto* corporation under a general law, there must have been a *bona fide* attempt to organize. If persons fraudulently attempt to organize and exercise corporate powers under color of a general incorporation law, the fraud will prevent them from acquiring the status of a corporation *de facto,* and their corporate existence may be collaterally attacked whenever it is properly in issue. If the pretended incorporation is a fraud upon the act under which corporate existence is claimed, there is no corporation either *de jure* or *de facto.*[172]

Thus, in a New Jersey case, where persons associated themselves together for the purpose of carrying on the quarrying business in New Jersey, and took proceedings to incorporate under a general corporation law of New York, they were held liable as partners upon the ground that they were not a corporation even *de facto.* The chancellor said that they were not a domestic corporation, and could not be sued as such, and that they were not a foreign corporation, because it was manifest upon the face of their proceedings that their attempted organization under the

191; United States Vinegar Co. v. Schlegel, 143 N. Y. 537; Garrett v. Dillsburg & Mechanicsburg R. Co., 78 Pa. St. 465.

[171] Booth v. Wonderly, 36 N. J. Law, 250.

[172] Montgomery v. Forbes, 148 Mass. 249, 2 Keener's Cas. 1945, 1 Smith's Cas. 94, 1 Cum. Cas. 69. And see Gartside Coal Co. v. Maxwell, 22 Fed. 197; Hill v. Beach, 12 N. J. Eq. 31; Paterson v. Arnold, 45 Pa. St. 410; Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989; Niemeyer v. Little Rock Junction Railway, 43 Ark. 111; Empire Mills v. Alston Grocery Co., 4 Willson, Civ. Cas. Ct. App. (Tex.) § 221; Davidson v. Hobson, 59 Mo. App. 130; Terwilliger v. Great Western Tel. Co., 59 Ill. 249; Chicago & Grand Trunk R. Co. v. Miller, 91 Mich. 166.

See, however, Southern Bank of Georgia v. Williams, 25 Ga. 534; United States Vinegar Co. v. Schlegel, 143 N. Y. 537.

In Davidson v. Hobson, 59 Mo.

general law of New York was a fraud upon that law.[173] And in a Pennsylvania case it was held that, while a special act of the legislature creating a corporation is conclusive evidence of its validity, organization as a corporation under a general law will not cover any fraud of which the corporators may be guilty, and that creditors of the corporation may show such fraud in order to set aside the immunity which a charter, fairly obtained, is intended to furnish.[174]

"With regard to corporations not acting under special charters of legislative grant, but voluntarily organized under general laws, although their existence as corporations cannot be questioned collaterally, yet if they have resulted from fraudulent combinations of individuals to procure powers under circumstances, and for purposes not within the scope and purpose of legislative intent, and the corporators, under shelter of their articles, are about to exercise powers oppressive to the individual they may be restrained by private suit of those injured or about to be. Fraud has no immunity anywhere, in any guise."[175]

(f) Compliance with the requirements of the statute—(1) In general.—There is much conflict in the decisions as to what compliance with the requirements of the statute in the organization of a corporation is necessary to the creation of a corporation *de facto*. It is impossible to reconcile the cases on this point, or to formulate any rules which will apply in all jurisdictions. Some of the cases hold that a substantial compliance with all conditions precedent is necessary. Others hold, or seem to hold, that no compliance at all with conditions precedent is necessary. And others range between these two extremes. Indeed it is some-

App. 130, it was held that a corporation whose charter is obtained by fraud or false pretenses, as by misrepresenting the amount of its capital stock, has no lawful existence; and that the promoters and members thereof, assuming to carry on business under its corporate name, are mere partners in the enterprise.

[173] Hill v. Beach, 12 N. J. Eq. 31.

[174] Paterson v. Arnold, 45 Pa. St. 410. But see Cochran v. Arnold, 58 Pa. St. 399; Garrett v. Dillsburg & Mechanicsburg R. Co., 78 Pa. St. 465.

[175] Niemeyer v. Little Rock Junction Railway, 43 Ark. 111, 120.

times difficult, if not impossible, to reconcile decisions in the same state.[176]

——**(2) View that a substantial compliance with conditions precedent is necessary.**—In California and several other states it seems to have been held that if a general law authorizing the formation of corporations requires certain steps to be taken, and expressly or impliedly makes compliance with such requirements a condition precedent to the existence of corporate powers, failure to comply *substantially* with any one of such conditions precedent will prevent the coming into existence of a corporation either *de jure* or *de facto,* and that the omission may be taken advantage of collaterally as well as directly, and in any action or proceeding in which the question of incorporation may be properly in issue,[177] unless, as will presently be explained, there is some element of estoppel.[178]

——**(3) View that colorable compliance with conditions precedent is sufficient.**—This view, however,—that there cannot be a corporation *de facto* without a *substantial* compliance with all conditions precedent,—cannot be sustained either in reason or on principle, and it is opposed to the decided weight of authority. A substantial compliance with all conditions precedent will make a corporation *de jure,* and therefore, to hold that this much is necessary to give rise to a corporation *de facto,* does away altogether with the necessity for the doctrine in relation

[176] Compare, for example, Johnson v. Corser, 34 Minn. 355, 1 Smith's Cas. 100, with Trustees of East Norway Lake N. E. L. Church v. Froislie, 37 Minn. 447, and Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 1 Smith's Cas. 87, 2 Keener's Cas. 1949. Also compare Jones v. Aspen Hardware Co., 21 Colo. 263, with Humphreys v. Mooney, 5 Colo. 282, and Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113.

[177] Mokelumne Hill Canal & Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Harris v. McGregor, 29 Cal. 124; Bonaparte v. Baltimore, Hampden & L. R. R. Co., 75 Md. 340, 1 Keener's Cas. 77; Boyce v. Trustees of Towsontown Station of M. E. Church, 46 Md. 359, 1 Smith's Cas. 146; Maryland Tube & Iron Works v. West End Imp. Co., 87 Md. 207; Jones v. Aspen Hardware Co., 21 Colo. 263; McLennan v. Hopkins, 2 Kan. App. 260; Field v. Cooks, 16 La. Ann. 153; Williams v. Hewitt, 47 La. Ann. 1076; Bartholomew v. Bentley, 1 Ohio St. 37; Shields v. Clifton Hill Land Co., 94 Tenn. 123, 45 Am. St. Rep. 700.

Some of the cases above cited are opposed to later decisions in the same state. See note 180, infra.

[178] Post. § 83 et seq.

to *de facto* corporations. In reason, it is too clear to admit of question that something less is required for a corporation *de facto* than is necessary for a corporation *de jure.*

The true doctrine, amply supported by authority in a number of states, is to the effect that there is a corporation *de facto* when there has been a *bona fide* attempt to organize under the law, and a *colorable or apparent* compliance with the requirements of the law. As was said in a late Minnesota case, "the failure as to some substantial requirement will prevent the body being a corporation *de jure;* but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto.*"[179]

If there has been a colorable or apparent compliance with the provisions of the statute, the fact that the requirements which have not been substantially complied with were intended by the legislature as conditions precedent to the exercise of corporate powers will not prevent the existence of a corporation *de facto.* This doctrine is well supported by authority, and has been applied to corporations organized under general laws, as well as to those organized under a special charter.[180]

[179] Gilfillan, C. J., in Finnegan v. Noerenberg, 52 Minn. 239, 244, 38 Am. St. Rep. 552, 2 Keener's Cas. 1949, 1 Smith's Cas. 87.

"Where it is shown that there is a charter or a law under which a corporation with the powers assumed might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence of a corporation de facto is established." Runyon, Ch., in Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989.

[180] Stokes v. Findlay, 4 McCrary, 205, Fed. Cas. No. 13,478; Bakersfield Town Hall Ass'n v. Chester, 55 Cal. 98; Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113; Humphreys v. Mooney, 5 Colo. 282; Canfield v. Gregory, 66 Conn. 9; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 1 Smith's Cas. 112; Heaston v. Cincinnati & Ft. Wayne R. Co., 16 Ind. 275, 79 Am. Dec. 430, 1 Cum. Cas. 411; Laflin & Rand Powder Co. v. Sinsheimer, 46 Md. 315, 24 Am. Rep. 522; Keene v. Van Reuth, 48 Md. 184; Eaton v. Walker, 76 Mich. 579; Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 1 Smith's Cas. 87, 2 Keener's Cas. 1949; Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989; Walton v. Oliver, 49 Kan. 107, 33 Am. St. Rep. 355; Union Water Co. v. Kean, 52 N. J. Eq. 111; Lamming v. Galusha, 84 Hun (N. Y.) 247, 151 N. Y. 648; Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, 1 Cum. Cas. 407; Buffalo & Allegany R. Co. v. Cary, 26 N. Y. 75, 1 Smith's Cas. 89, 1 Cum. Cas. 411; Eaton v. Aspinwall, 19 N. Y. 119, 2 Keen-

——(4) **Colorable compliance with statute is necessary.**—To constitute a body of men a *de facto* corporation, there must be at least a colorable or apparent compliance with statutory requirements. Mere assumption of corporate powers under a statute authorizing incorporation, without an organization in apparent or colorable compliance with the statute, does not give corporate existence either *de jure* or *de facto*.[181]

——(5) **Particular cases.**—In a New York case it appeared that, in the organization of a railroad company, the articles of association were in due form except for failure to allege, as required by the statute, that it was intended in good faith to construct, maintain, and operate the road mentioned therein. The other requirements of the statute were complied with, and the construction of the road contracted for. Under these circumstances it was held that the compliance with the statute was at least colorable, and that there was a corporation *de facto,* the corporate existence of which could not be questioned by a subscriber to the capital stock in an action on his subscription. "I

er's Cas. 1937, 1 Cum. Cas. 975; Tar River Nav. Co. v. Neal, 3 Hawks (N. C.) 520; Society Perun v. City of Cleveland, 43 Ohio St. 481, 1 Smith's Cas. 120, 2 Keener's Cas. 1953; Marsh v. Mathias, 19 Utah, 350; Bash v. Culver Gold Min. Co., 7 Wash. 122; Carroll v. Pacific Nat. Bank, 19 Wash. 639; Slocum v. Head, 105 Wis. 431; Franke v. Mann, 106 Wis. 118; Carpenter v. Frazer, 102 Tenn. 462; Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch.) 56 S. W. 35. And see the other cases more specifically cited in notes following.

[181] Jones v. Aspen Hardware Co., 21 Colo. 263; Oroville & Virginia R. Co. v. Plumas County Sup'rs, 37 Cal. 354; Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113; Bigelow v. Gregory, 73 Ill. 197; Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652; Loverin v. McLaughlin, 161 Ill. 417; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977; Bash v. Culver Gold Min. Co., 7 Wash. 122; Bergeron v. Hobbs, 96 Wis. 641; Utley v. Union Tool Co., 11 Gray (Mass.) 139, 2 Keener's Cas. 1934, 1 Cum. Cas. 967; Montgomery v. Forbes, 148 Mass. 249, 1 Cum. Cas. 69, 1 Smith's Cas. 94, 2 Keener's Cas. 1945; Doyle v. Mizner, 42 Mich. 332; Eaton v. Walker, 76 Mich. 579; Richmond Factory Ass'n v. Clarke, 61 Me. 351; Wilmington & Manchester R. Co. v. Wright, 5 Jones (N. C.) 304; Guckert v. Hacke, 159 Pa. St. 303; Hurt v. Salisbury, 55 Mo. 310; McVicker v. Cone, 21 Or. 353; Johnson v. Corser, 34 Minn. 355, 1 Smith's Cas. 100; Johnson v. Okerstrom, 70 Minn. 303; McLennan v. Hopkins, 2 Kan. App. 260; Walter v. Oliver, 49 Kan. 107, 33 Am. St. Rep. 355; Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989; Union Water Co. v. Kean, 52 N. J. Eq. 111; Teitig v. Boesman, 1[illegible] Mont. 404; McCallion v. Hibernia Sav. & Loan Soc., 70 Cal. 163.

am of the opinion," said Judge Masten, "that under this and similar general acts for the formation of corporations, if the papers filed, by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the state against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation *de facto,* and no advantage can be taken of such a defect in its constitution, collaterally, by any person. Any other rule, it seems to me, must be fraught with serious consequences and great public mischief. Most of the persons who subscribe in good faith for the stock, do not examine to see whether all the requirements of the statute in the organization of the corporation have been complied with; and if they did examine would not probably discover a defect like the one now pointed out. The stock is sold in market from hand to hand without any such examination. The corporation may carry on its business for years, and its stock have entirely changed hands, when its property may be destroyed by a trespasser, and in an action against him in the name of the corporation, his only defense, 'you are not legally a corporation by reason of a defect in your constitution,' would (upon the doctrine contended for by the defendant) be successful. The doctrine of estoppel could not be applied in that case, as it has been in some cases, to counteract an erroneous decision upon the question now before me."[182]

In a Colorado case, a mortgage executed by a body of men assuming to act as a corporation after an attempted organization was attacked upon the ground that there had been no compliance with a provision of the statute requiring the certificate of incorporation to be acknowledged, and that its acknowledgment was intended as a condition precedent to the assumption of corporate powers. The court overruled the objection on the ground that there was a *de facto* corporation. "We are aware," said the court, "of the distinction between mere omissions or irregularities, and what are called 'prerequisites' of the statutes. The dis-

[182] Buffalo & Allegany R. Co. v. First Baptist Soc. v. Rapalee, 16 Cary, 26 N. Y. 75, 1 Smith's Cas. Wend. (N. Y.) 605, and decisions 89, 1 Cum. Cas. 411, disapproving of the supreme court.

tinction may well be taken in a direct proceeding or other exceptional cases where strict proof is required, but we do not regard it as having any controlling place in the case at bar. What is or what is not a prerequisite is often a difficult question for a professional man, and much more for a layman, to determine. To cast such a burden upon the public as between its individual members is to lose sight of the reason for, and largely abrogate, the salutary rule respecting *de facto* corporations."[183]

In a Massachusetts case, on the other hand, where a general law authorized any five or more persons of lawful age to associate together, by written articles of agreement, and declared that when such articles should be executed and recorded in the office of the clerk of the town in which the principal business was to be carried on, and in that of the secretary of state, they should be a corporation, etc., and further provided that the object of the corporation, the place in which its business was to be carried on, and the amount of capital stock to be paid in, should be distinctly set forth in the articles of agreement, and where a person, with other persons who were associated in name only, undertook to organize as a corporation, without complying with the requirements of the statute, and purchased goods, it was held that there was no corporation, either *de jure* or *de facto*, and he was held individually liable. "This is not a case," it was said, "where there has been a defective organization of a corporation which has a legal existence under a valid charter. Here there was no corporation. It was just the same as if the defendant had done nothing at all in the way of establishing a corporation."[184] In another case in the same state it was held that there was no corporation *de facto* where there were no written articles of association, as required by the statute.[185]

It has been held by some courts, though not by all, as will be seen from the cases cited in the notes below, that there may be

[183] Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113, 116. Compare Jones v. Aspen Hardware Co., 21 Colo. 263.

[184] Montgomery v. Forbes, 148 Mass. 249, 1 Cum. Cas. 69, 2 Keener's Cas. 1945, 1 Smith's Cas. 94.

[185] Utley v. Union Tool Co., 11 Gray (Mass.) 139, 2 Keener's Cas. 1934, 1 Cum. Cas. 967.

a corporation *de facto,* the existence of which cannot be attacked collaterally, though statutory requirements have not been substantially complied with by promptly preparing, signing, and acknowledging articles of association, or a certificate of association or incorporation;[186] though the articles or certificate have not been properly executed or acknowledged, or signed and acknowledged, by the full number of corporators required by the statute;[187] though they have not been properly recorded or filed,[188] or published;[189] though the articles are partly

[186] Dannebroge Gold Quartz Min. Co. v. Allment, 26 Cal. 286; Humphreys v. Mooney, 5 Colo. 282; Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113; Curtis v. Meeker, 62 Ill. App. 49, affirmed in Curtis v. Tracy, 169 Ill. 233; Keene v. Van Reuth, 48 Md. 184; Trustees of East Norway Lake N. E. L. Church v. Froislie, 37 Minn. 447; Johnson v. Okerstrom, 70 Minn. 303; Franke v. Mann, 106 Wis. 118.

Contra, Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977.

Though the acknowledgment of the articles or certificate, or the certificate of acknowledgment, or authentication of the notarial act, is defective in form. Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989.

[187] Johnson v. Akerstrom, 70 Minn. 303; Duggan v. Colorado Mortg. & Inv. Co., 11 Colo. 113; Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch.) 56 S. W. 35.

[188] McGowan v. American Pressed Tan Bark Co., 121 U. S. 575; Stokes v. Findlay, 4 McCrary, 205, Fed. Cas. No. 13,478; Grand River Bridge Co. v. Rollins, 13 Colo. 4; Tarbell v. Page, 24 Ill. 46; Baker v. Backus' Adm'r, 32 Ill. 79; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 1 Smith's Cas. 112; Keene v. Van Reuth, 48 Md. 184; Hause v. Mannheimer, 67 Minn. 194; Trustees of East Norway Lake N. E. L. Church v. Froislie, 37 Minn. 447; In re Shakopee Mfg. Co., 37 Minn. 91; Johnson v. Okerstrom, 70 Minn. 303; Granby Mining & Smelting Co. v. Richards, 95 Mo. 106; Vanneman v. Young, 52 N. J. Law, 403; Leonardsville Bank v. Willard, 25 N. Y. 575.

Contra, under some statutes. Wechselberg v. Flour City Nat. Bank, 56 Iowa, 104, 41 Am. Rep. 90; Garnett v. Richardson, 35 Ark. 144; Jones v. Aspen Hardware Co. 21 Colo. 263; Indianapolis Furnace & Min. Co. v. Herkimer, 46 Ind. 142, 1 Smith's Cas. 97, 1 Cum. Cas. 970; Marshall v. Harris, 55 Iowa, 182; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977; McLennan v. Hopkins, 2 Kan. App. 260; Field v. Cooks, 16 La. Ann. 153; Johnson v. Corser, 34 Minn. 355, 1 Smith's Cas. 100; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; Guckert v. Hacke, 159 Pa. St. 303; Childs v. Hurd, 32 W. Va. 99; Bergeron v. Hobbs, 96 Wis. 641.

The existence of a corporation cannot be collaterally attacked on the ground that the certificate of the secretary of state was not registered, as required by law, with a facsimile of the great seal of the state, where it appears that the certificate was registered, but the facsimile of the seal was not accurately drawn. Carpenter v. Frazer, 102 Tenn. 462.

[189] Holmes v. Gilliland, 41 Barb. (N. Y.) 568.

Contra, Williams v. Hewitt, 47 La. Ann. 1076.

for a purpose not authorized by the statute;[190] though the articles or certificates fail to state all the facts required by the statute to be stated,[191] or contain unnecessary statements;[192] though the certificate filed in the office of the secretary of state varies from the articles of association;[193] though the corporation was not organized within the time limited by the charter, or the general law;[194] though the capital stock or a certain percentage thereof was not subscribed or paid, as required by the statute;[195] though there was failure to give the notice required by the statute of the meeting for the purpose of organization;[196] and though there was no payment of the money required by the statute to be paid to the state treasurer.[197]

[190] Saunders v. Farmer, 62 N. H. 572.

It is otherwise, as we have seen, when a corporation is organized for a purpose not authorized at all by the statute. Ante, § 82(e)(3).

[191] Thus it has been held that a corporation de facto exists, though the articles of association fail to state the place where its business is to be carried on, as required by the statute. Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 1 Smith's Cas. 87, 2 Keener's Cas. 1949.

Contra, Harris v. McGregor, 29 Cal. 124.

Or though the certificate does not state, as required by the statute, whether the stock is assessable or not. Humphreys v. Mooney, 5 Colo. 282.

Or though the certificate of incorporation of a railroad company fails to state the route or termini of the road, as required by the statute. Cayuga Lake R. Co. v. Kyle, 64 N. Y. 185.

On the other hand, it has been held that there is no corporation de facto where the articles or certificate fail to state, as the statute requires, the maximum indebtedness which the corporation may incur. Heuer v. Carmichael, 82 Iowa, 288; Stivers v. Carmichael, 83 Iowa, 759.

Or the number of shares held by each stockholder. Williams v. Hewitt, 47 La. Ann. 1076.

[192] Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546. And see ante, § 76.

[193] Saunders v. Farmer, 62 N. H. 572.

[194] County of Macon v. Shores, 97 U. S. 272, 277; Lehman v. Warner, 61 Ala. 455; St. Louis, Alton & T. H. R. Co. v. Belleville City Ry. Co., 158 Ill. 390.

[195] Stokes v. Findlay, 4 McCrary, 205, Fed. Cas. No. 13,478; Duke v. Cahawba Nav. Co., 10 Ala. 82, 16 Ala. 372; Lehman v. Warner, 61 Ala. 455; Bibb v. Hall, 101 Ala. 79; Canfield v. Gregory, 66 Conn. 9, 17; Union Water Co. v. Kean, 52 N. J. Eq. 111. Contra, Wechselberg v. Flour City Nat. Bank, 24 U. S. App. 308, 64 Fed. 90.

[196] Trustees of East Norway Lake N. E. L. Church v. Froislie, 37 Minn. 447.

[197] McClinch v. Sturgis, 72 Me. 288; Eaton v. Aspinwall, 19 N. Y. 119, 2 Keener's Cas. 1937, 1 Cum. Cas. 975; Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340.

Contra, Jones v. Aspen Hardware Co., 21 Colo. 263; Slocum v. Providence Steam & Gas Pipe Co., 10 R. I. 112, 1 Smith's Cas. 134; Slocum v. Warren, 10 R. I. 116, 1 Smith's Cas. 136.

It has been held that there is no corporation *de facto* where the corporators have failed to obtain the authorization or certificate, required by the statute, from the attorney general, district attorney, or judge;[198] but it has been held that failure to obtain a certificate from the state auditor authorizing commencement of business does not prevent the creation of a *de facto* corporation.[199]

(g) Incapacity of the corporators.—When persons assume to act as a body, and are permitted by the acquiescence of the public and the state to act as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is express recognition by the general law, such a body of persons is a corporation *de facto,* although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so. This is on the same principle on which it is held that a person may be a *de facto* officer, although ineligible.[200]

Where articles of association and incorporation, alleging that two of the corporators were residents of the state, were regularly filed, and a certificate issued by the secretary of state, and it afterwards appeared that there were not two citizens of the state among the corporators, it was held that there was a *de facto* corporation, and that subsequent stockholders could not be held liable as partners.[201]

(h) Assumption or user of corporate powers.—To make a body of men a corporation *de facto,* it is not enough to show merely that there is a law under which they might be a corporation, that they have attempted in good faith to organize under it, and that they have colorably or apparently complied with its provisions, but it is also necessary to show that they have assumed the

[198] Field v. Cooks, 16 La. Ann. 153; Richmond Factory Ass'n v. Clarke, 61 Me. 351.

[199] Stokes v. Findlay, 4 McCrary, 205, Fed. Cas. No. 13,478.

[200] Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co., 82 Fed. 642, 650, per Taft, J., citing Norton v. Shelby County, 118 U. S. 425, and Blackburn v. State, 3 Head (Tenn.) 690. And see American Salt Co. v. Heidenheimer, 80 Tex. 344, 26 Am. St. Rep. 743.

[201] American Salt Co. v. Heidenheimer, 80 Tex. 344, 26 Am. St. Rep. 743. And see Halbert v. San Saba Spring Land & Live Stock

character of a corporation, and exercised corporate powers.[202] And the acts relied upon as showing user must be corporate acts, as distinguished from acts which might just as well be performed by an unincorporated association.[203]

The degree of proof of user necessary to show *de facto* corporate existence depends, said the New York court, to some extent upon the nature of the corporation, and the law under which it is organized. Where no provision is made for any permanent evidence of the fact of organization, more proof of user is necessary than where the essential steps by which the organization is accomplished are required to be made a matter of record. If there is a valid law under which a corporation might exist, and the record shows a *bona fide* attempt to organize under it, very slight evidence of user beyond this is necessary.[204] Taking subscriptions to and issuing stock, electing managers and directors, adopting by-laws, buying a lot, and constructing and leasing a building upon it. is a sufficient user to constitute a corporation *de facto*.[205]

Ass'n (Tex. Civ. App.) 34 S. W. 636.

[202] People v. Volcano Canyon Toll-Road Co., 100 Cal. 87; Martin v. Deetz, 102 Cal. 55, 64, 41 Am. St. Rep. 151; Jones v. Aspen Hardware Co., 21 Colo. 263, 269; Bash v. Culver Gold Min. Co., 7 Wash. 122; Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; Eaton v. Walker, 76 Mich. 579; Welch v. Old Dominion Min. & Ry. Co., 10 N. Y. Supp. 174; Wall v. Mines (Cal.) 62 Pac. 386.

A corporation de facto exists "where a number of persons have organized and acted as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs to some extent, at least, by the methods and through the officers usually employed by corporations; and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body." Martin v. Deetz, 102 Cal. 55, 65, 41 Am. St. Rep. 151.

[203] Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; Kirkpatrick v. United Presbyterian Church of Keota, 63 Iowa, 372; DeWitt v. Hastings, 40 N. Y. Super. Ct. 463.

"If the acts and proceedings of a company or association consist only of such acts and proceedings as might be performed without an incorporating act, or corporate grant or franchise, a corporation cannot be inferred from such acts." Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416, 420.

[204] Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, 1 Cum. Cas. 407; Eaton v. Walker, 76 Mich. 579; Merriman v. Magiveny, 12 Heisk. (Tenn.) 494; Augusta Mfg. Co. v. Vertrees, 4 Lea (Tenn.) 75; Ward v. Minnesota & Northwestern R. Co., 119 Ill. 287.

[205] Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552, 2 Keener's Cas. 1949, 1 Smith's Cas. 87.

IV. ESTOPPEL TO DENY INCORPORATION.

§ 83. In general.—Though there is some conflict in the decisions, the following rules as to estoppel to deny incorporation are established by the weight of authority:

(1) One who contracts or otherwise deals with an association as a corporation thereby admits its incorporation, and is estopped to deny its corporate existence, whether it be a corporation de facto or not, in any action or proceeding based upon or arising out of such contract or dealing, or even in other proceedings, where his standing is based upon such contract or dealing, as against the association itself, its members, or any person claiming under it, unless, because of fraud, or for some other reason, it would be inequitable to apply the doctrine of estoppel.

(2) In like manner, as a general rule, a person who participates in holding an association out as a corporation, whether as an officer or as a member or stockholder, and the association itself, as a body, thereby represents that it is legally incorporated, and is estopped to deny its incorporation as against any person dealing with it as a corporation on the faith of such representation, or any person claiming under him.

(3) To give rise to an estoppel, there must be some recognition or holding out of the association as a corporation, or, in other words, the acts relied upon as constituting an estoppel must not be entirely consistent with the existence of an unincorporated association.

§ 84. Estoppel by dealing with a pretended corporation.

(a) Action by corporation on contract.—It is clearly contrary to principles of equity, in the absence of fraud, to allow one who has entered into a contract with an association as a corporation to repudiate his obligations under the contract, after he has received the benefit of it, by setting up as a defense that the association is not a corporation, and therefore could not make the contract, or cannot sue upon it. And it is well settled, therefore, in most jurisdictions, although not in all, that a person who recognizes the existence of a body of men as a corporation by executing a note to them, or otherwise contracting with them, as a corporation,[206] is estopped to deny their incorporation in an action against him on the contract.[207]

[206] Post, § 92.

[207] United States: Casey v. Galli, 94 U. S. 673; Smith v. Sheeley, 12

——**Illustrations.**—According to this doctrine, one who borrows money or purchases property and gives a note and mortgage

Wall. 358; Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co., 82 Fed. 642; Andes v. Ely, 158 U. S. 312; Gartside Coal Co. v. Maxwell, 22 Fed. 197.

Alabama: Marion Sav. Bank v. Dunkin, 54 Ala. 471; Cahall v. Citizens' Mut. Bldg. Ass'n, 61 Ala. 232; Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695.

Arkansas: Town of Searcy v. Yarnell, 47 Ark. 269.

California: Grangers' Business Ass'n v. Clark, 67 Cal. 634; Fresno Canal & Irr. Co. v. Warner, 72 Cal. 379; Pacific Bank v. De Ro, 37 Cal. 538; Bank of Shasta v. Boyd, 99 Cal. 604.

Colorado: Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531; Plummer v. Struby-Estabrooke Mercantile Co., 23 Colo. 190; Grande Ronde Lumber Co. v. Cotton, 12 Colo. App. 375; First Congregational Church v. Grand Rapids School Furniture Co. (Colo. App.) 60 Pac. 948.

Connecticut: West Winsted Sav. Bank & Bldg. Ass'n v. Ford, 27 Conn. 282, 71 Am. Dec. 66.

Florida: Jackson Sharp Co. v. Holland, 14 Fla. 384; Booske v. Gulf Ice Co., 24 Fla. 550.

Georgia: Southern Bank of Georgia v. Williams, 25 Ga. 534; Wood v. Coosa & C. R. Co., 32 Ga. 273; Imboden v. Etowah & Battle Branch H. H. Min. Co., 70 Ga. 86, 107.

Illinois: Tarbell v. Page, 24 Ill. 46; Lombard v. Chicago Sinai Ass'n, 64 Ill. 477; Brown v. Scottish American Mortg. Co., 110 Ill. 235; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Winget v. Quincy Bldg. & Homestead Ass'n, 128 Ill. 67, 84.

Indiana: Jones v. Cincinnati Type Foundry Co., 14 Ind. 89, 1 Smith's Cas. 140; Judah v. American Live Stock Ins. Co., 4 Ind. 333; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415, 1 Smith's Cas. 117; Ransom v. Priam Lodge No. 145, 51 Ind. 60; Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29; Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298; Brickley v. Edwards, 131 Ind. 3.

Iowa: Washington College v. Duke, 14 Iowa, 14; Brown v. Phillips, 16 Iowa, 210.

Kansas: Pape v. Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183.

Kentucky: Henderson & Nashville R. Co. v. Leavell, 16 B. Mon. (Ky.) 358; Bank of Galliopolis v. Trimble, 6 B. Mon. (Ky.) 599.

Louisiana: Liverpool & London Fire & Life Ins. Co. v. Hunt, 11 La. Ann. 623; Latiolais v. Citizens' Bank of Louisiana, 33 La. Ann. 1444; American Homestead Co. v. Linigan, 46 La. Ann. 1118.

Maine: South Bay Meadow Dam Co. v. Gray, 30 Me. 547; Simpson v. Garland, 76 Me. 203.

Maryland: (See infra, this note.)

Massachusetts: Worcester Medical Institution v. Harding, 11 Cush. (Mass.) 285; Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264, 1 Cum. Cas. 420.

Michigan: Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124; Swartwout v. Michigan Air Line R. Co., 24 Mich. 389; Merchants' & Manufacturers' Bank v. Stone, 38 Mich. 779; Estey Mfg. Co. v. Runnels, 55 Mich. 130; Stofflet v. Strome, 101 Mich. 197.

Minnesota: St. Paul Land Co. v. Dayton, 39 Minn. 315; Minnesota Gas Light Economizer Co. v. Denslow, 46 Minn. 171; Columbia Electric Co. v. Dixon, 46 Minn. 463; Perine v. Grand Lodge A. O. U. W., 48 Minn. 82; Richards v. Minnesota Sav. Bank, 75 Minn. 196; Continental Ins. Co. v. Richardson, 69 Minn. 433.

Mississippi: Johnson v. Grumble (Miss.) 19 So. 100.

Missouri: Camp v. Byrne, 41 Mo. 525; Farmers' & Merchants' Ins.

to a corporation cannot deny its corporate existence to defeat an action to recover on the note, or to foreclose the mortgage.[208] A city which has contracted by ordinance with a waterworks company, as a corporation, to rent hydrants, and has used the

Co. v. Needles, 52 Mo. 17; National Ins. Co. v. Bowman, 60 Mo. 252; Stoutimore v. Clarke, 70 Mo. 471, 1 Smith's Cas. 142; Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; St. Louis Gas Light Co. v. City of St. Louis, 84 Mo. 202.

Nebraska: Platte Valley Bank v. Harding, 1 Neb. 461; Exchange Nat. Bank v. Capps, 32 Neb. 242, 29 Am. St. Rep. 433; Globe Pub. Co. v. State Bank, 41 Neb. 175; Livingston Loan & Bldg. Ass'n v. Drummond, 49 Neb. 200; Nebraska Nat. Bank v. Ferguson, 49 Neb. 109.

New Hampshire: Congregational Society in Troy v. Perry, 6 N. H. 164, 25 Am. Dec. 455; Nashua Fire Ins. Co. v. Moore, 55 N. H. 48.

New Jersey: Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989.

New York: Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, 1 Cum. Cas. 407; Whitford v. Laidler, 94 N. Y. 145, 46 Am. Rep. 131; Commercial Bank of Keokuk v. Pfeiffer, 108 N. Y. 242. But see Welland Canal Co. v. Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51.

North Carolina: Ryan v. Martin, 91 N. C. 464; Fayetteville Waterworks Co. v. Tillinghast, 119 N. C. 343.

Ohio: Lucas v. Greenville Bldg. & Sav. Ass'n, 22 Ohio St. 339; Hagerman v. Ohio Bldg. & Sav. Ass'n, 25 Ohio St. 186; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343.

Pennsylvania: Dyer v. Walker, 40 Pa. St. 157; Cochran v. Arnold, 58 Pa. St. 399; Hassinger v. Ammon, 160 Pa. St. 245.

Rhode Island: Slocum v. Providence Steam & Gas Pipe Co., 10 R. I. 112, 1 Smith's Cas. 134; Slocum v. Warren, 10 R. I. 116, 1 Smith's Cas. 136.

South Dakota: Building & Loan Ass'n of Dakota v. Chamberlain, 4 S. D. 271.

Tennessee: Merriman v. Magliveny, 12 Helsk. (Tenn.) 494.

Utah: McCord & Nave Mercantile Co. v. Glenn, 6 Utah, 139; Jackson v. Crown Point Min. Co., 21 Utah, 1.

Vermont: Bank of Manchester v. Allen, 11 Vt. 302.

West Virginia: Ginger Mfg. Co. v. Bennett, 28 W. Va. 16.

Wisconsin: Whitney v. Robinson, 53 Wis. 309.

That a person who executes a deed or a mortgage to an association as a corporation is estopped to defeat the same by alleging that the association was not a corporation, see post, § 85, note 256.

In Maryland, this doctrine has been repudiated, and it has been held that a person dealing with an association as a corporation is not thereby estopped to deny its corporate existence. Maryland Tube & Iron Works v. West End Imp. Co., 87 Md. 207. And see Bonaparte v. Baltimore, Hampden & L. R. R. Co., 75 Md. 340, 1 Keener's Cas. 77; Boyce v. Trustees of Towsontown Station of M. E. Church, 46 Md. 359, 1 Smith's Cas. 146 (as to which see post, § 87(e), note 286). Compare, however, Bartlett v. Wilbur, 53 Md. 485; Franz v. Teutonia Bldg. Ass'n, 24 Md. 259.

[208] Grangers' Business Ass'n v. Clark, 67 Cal. 634; Bank of Shasta v. Boyd, 99 Cal. 604; Montgomery R. Co. v. Hurst, 9 Ala. 513; People's Sav. Bank & Bldg. Ass'n v. Collins, 27 Conn. 142; Pattison v. Albany Bldg. & Loan Ass'n, 63 Ga. 373; Snyder v. State Bank, 1 Ill. 161; Brown v. Scottish-American Mortg. Co., 110 Ill. 235; McLaughlin v. Citizens' Bldg., Loan & Sav. Ass'n, 62 Ind. 265; John v. Farmers' & Mechanics' Bank, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119;

same, is estopped to question the corporate existence of the company in a suit by it to recover rentals.[209] A person taking a lease from a corporation, or using its property under circumstances raising an implied obligation, cannot deny its existence in an action for rent or to recover the premises,[210] or to recover compensation for use and occupation.[211] The indorser of a note purporting to be made by a corporation cannot question its corporate existence.[212] A person effecting insurance in a mutual insurance company as a corporation, and thereby becoming a member, is estopped to deny its incorporation in an action against him on a premium note, or for an assessment.[213]

Estoppel by deed, including estoppel by conveyance to or from a corporation, and estoppel by record, is treated in subsequent sections.[214]

In some of the cases it has been said that contracting with an association held out as a corporation is only *prima facie* evidence of its incorporation;[215] but if it is meant by this that a

Beaver v. Hartsville University, 34 Ind. 245; Franklin v. Twogood, 18 Iowa, 515; Bank of Galliopolis v. Trimble, 6 B. Mon. (Ky.) 599; American Homestead Co. v. Linigan, 46 La. Ann. 1118; Franz v. Teutonia Bldg. Ass'n, 24 Md. 259; Platte Valley Bank v. Harding, 1 Neb. 461; Exchange Nat. Bank v. Capps, 32 Neb. 242, 29 Am. St. Rep. 433; Lucas v. Greenville Bldg. & Sav. Ass'n, 22 Ohio St. 339; Stoutimore v. Clark, 70 Mo. 471, 1 Smith's Cas. 142; Father Matthew, etc., Soc. v. Fitzwilliams, 84 Mo. 406; School Dist. No. 61 v. Alderson, 6 Dak. 145; First Congregational Church v. Grand Rapids School Furniture Co. (Colo. App.) 60 Pac. 948.

Where a county or other municipality issues bonds payable to a railroad company as a legally existing corporation, and not preliminary to, and conditional upon, organization, it is estopped to deny that the company was a de jure corporation at the time the bonds were issued. Darlington v. La Clede County, 4 Dill. 200, Fed. Cas. No. 3,577; Lewis v. Clarendon, 5 Dill. 329, Fed. Cas. No. 8,320; Douglas County Com'rs v. Bolles, 94 U. S. 104. See, also State v. Trustees of Union Tp., 8 Ohio St. 394.

[209] City of Greenville v. Greenville Waterworks Co. (Ala.) 27 South. 764.

[210] Fayetteville Waterworks Co. v. Tillinghast, 119 N. C. 343; Lamb v. Beaumont Temperance Hall Co., 2 Tex. Civ. App. 289.

[211] Proprietors of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276.

[212] Pacific Bank v. De Ro, 37 Cal. 538.

[213] Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457. See, also, White v. Ross, 15 Abb. Pr. (N. Y.) 66; White v. Coventry, 29 Barb. (N. Y.) 305; Hyatt v. Whipple, 37 Barb. (N. Y.) 595; Cooper v. Shaver, 41 Barb. (N. Y.) 151; Freeland v. Pennsylvania Cent. Ins. Co., 94 Pa. St. 504.

[214] Post, §§ 85, 86.

[215] Montgomery R. Co. v. Hurst, 9 Ala. 513; Brown v. Scottish American Mortg. Co., 110 Ill. 235; Trogdon v. Cleveland Stone Co.,

person who has contracted with a body of men as a corporation may, in the absence of any fraud on their part, deny their incorporation, after receiving the benefit of the contract, and thus escape liability thereon, these decisions cannot be sustained.[216]

——**Statutory provisions.**—In some jurisdictions, the rule that a person dealing with an association as a corporation is estopped to deny its corporate existence has been prescribed by statute. Thus, in Iowa it is declared that no person sued on a contract with a corporation shall set up its want of legal organization in defense.[217] And in Texas it is provided that no person who assumes an obligation to a corporation as such shall resist the enforcement of such obligation on the ground that there was in fact no such corporation, until that fact has been adjudged in a direct proceeding had for that purpose.[218]

(b) Organization out of the state.—This doctrine in relation to estoppel operates so as to prevent a person who has contracted or dealt with a corporation from denying the legality of its incorporation on the ground that it was organized in another state than that under the laws of which its corporate existence is claimed.[219]

(c) Amendment of charter.—It also prevents a person who has contracted with a corporation in a name conferred upon it by an amended charter from denying acceptance of the amendment or compliance with its provisions.[220]

53 Ill. App. 206; Williams v. Cheney, 3 Gray (Mass.) 215; Topping v. Bickford, 4 Allen (Mass.) 120; Williamsburg City Fire Ins. Co. v. Frothingham, 122 Mass. 391.

[216] See the cases cited in note 207, supra, and in the notes following.

[217] In Quinn v. Shields, 62 Iowa, 129, 49 Am. Rep. 141, it was held that a bequest is a "contract," within the meaning of this provision, and that, where a corporation seeks to enforce a bequest to it in a will duly probated, its claim cannot be resisted on the ground that it has not been legally organized.

[218] Under this provision, a person who has taken a lease from a corporation cannot deny its corporate existence in an action against him to recover rents and for the possession of the leased premises. Lamb v. Beaumont Temperance Hall Co., 2 Tex. Civ. App. 289.

[219] Camp v. Byrne, 41 Mo. 525; Tuckasegee Min. Co. v. Goodhue, 118 N. C. 981; Ohio & Mississippi R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128.

[220] Eppes v. Mississippi, Gainesville & T. R. Co., 35 Ala. 33; Fell v. McHenry, 42 Pa. St. 41. See ante, § 57(f).

(d) **Consolidation.**—And it prevents one who has contracted with a corporation attempted to be formed by the consolidation of existing corporations from denying the validity of the consolidation.[221]

(e) **Powers and privileges not implied from corporate existence.**—But it does not prevent a person who has dealt with a pretended corporation from denying the existence of powers or privileges which are not necessarily implied from corporate existence, but which depend upon the franchises actually conferred.[222]

(f) **Effect of judgment of forfeiture or ouster.**—Nor does it prevent a person who has contracted with a pretended corporation, and who is sued upon the contract, from setting up a judgment of forfeiture or ouster rendered in proceedings by the state after the contract was made.[223]

(g) **Action against members or officers as individuals.**—Though there are some decisions to the contrary,[224] by the weight of authority, the estoppel of one who has contracted with an association as a corporation to deny its corporate existence applies so as to prevent him from maintaining an action on the contract against the associates, or against the officers making the contract, as individuals. Having contracted with the association as a corporate body, he must sue the associates, if at all, as a corporation, unless there has been some fraud on their part rendering the doctrine of equitable estoppel inapplicable.[225]

[221] Lewis v. Clarendon, 5 Dill. 329, Fed. Cas. No. 8,320; post, § 353.

[222] Chapman v. Colby Bros. & Co., 47 Mich. 46.

[223] Brookville & G. Turnpike Co. v. McCarty, 8 Ind. 392, 65 Am. Dec. 768. See, also, Guaga Iron Co. v. Dawson, 4 Blackf. (Ind.) 202; Morgan v. Lawrenceburg Ins. Co., 3 Ind. 285.

[224] Hurt v. Salisbury, 55 Mo. 310; Glenn v. Bergmann, 20 Mo. App. 343; Cleaton v. Emery, 49 Mo. App. 345; Williams v. Hewitt, 47 La. Ann. 1076; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 2 Keener's Cas. 1939, 1 Cum. Cas. 977; Guckert v. Hacke, 159 Pa. St. 303.

[225] Gartside Coal Co. v. Maxwell, 22 Fed. 197; Cory v. Lee, 93 Ala. 468; Snider's Sons Co. v. Troy, 91 Ala. 224, 24 Am. St. Rep. 887, 1 Smith's Cas. 104; Jones v. Aspen Hardware Co., 21 Colo. 263; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; Urquhart v. Leverett, 69 Ga. 92; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 1 Smith's Cas. 112; Bradford v. Frankfort, St. Louis & T. R. Co., 142 Ind. 383; Merchants' & Manufacturers' Bank v. Stone, 38 Mich. 779; American Mirror & Glass-

"Where a person deals with what he supposes is a corporation, with what all parties think is a corporation, where he gives his credit to that supposed corporation, he cannot afterwards, when it turns out that it is not validly incorporated, turn round and say, 'Well, I dealt with this supposed corporation; I trusted it as a corporation; I sold goods to it as a corporation; but it seems when it first attempted to become incorporated that there was some defect or irregularity in its proceedings, so that it did not become legally incorporated, and therefore you who are stockholders will be held personally liable.'"[226]

(h) **Statutory liability of officers.**—Dealing with a corporation, however, or proving a claim against it, does not estop one to enforce against its officers a statutory liability for debts contracted before recording the certificate of incorporation.[227]

(i) **Statutory liability of stockholders.**—Nor is a person who contracts with a pretended corporation, and afterwards sues and recovers a judgment against it on the contract, estopped to enforce a statutory liability on the part of the stockholders, for such an action does not involve any denial of the existence of the corporation.[228]

(j) **Estoppel of subscribers to stock.**—The estoppel of a stockholder in a corporation to set up defects in its organization in order to defeat an action by the corporation on his subscription to its capital stock will be fully treated in another chapter. It is sufficient to say here that, by the weight of authority, he is estopped unless the subscription was merely preliminary to, and conditional upon, the organization of the corporation, and even in the case of such a preliminary subscription, if, after the at-

Beveling Co. v. Bulkley, 107 Mich. 447; Gow v. Collin & Parker Lumber Co., 109 Mich. 45; Hogue v. Capital Nat. Bank of Lincoln, 47 Neb. 929; Nebraska Nat. Bank of York v. Ferguson, 49 Neb. 109; Larned v. Beal, 65 N. H. 184; Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989; Second Nat. Bank of Cincinnati v. Hall, 35 Ohio St. 158, 166; Medill v. Collier, 16 Ohio St. 599; Cochran v. Arnold, 58 Pa. St. 399; Shields v. Clifton Hill Land Co., 94 Tenn. 123; Black River Imp. Co. v. Holway, 85 Wis. 344. Compare Wechselberg v. Flour City Nat. Bank, 24 U. S. App. 308, 64 Fed. 90.

[226] Mr. Justice Brewer, in Gartside Coal Co. v. Maxwell, 22 Fed. 197, 198.

[227] Loverin v. McLaughlin, 161 Ill. 417; post, chapter xxiv.

[228] Heuer v. Carmichael, 82 Iowa, 288; Stivers v. Carmichael, 83 Iowa, 759; post, chapter xxv.

tempted organization, or without any attempt at all to organize, he acted as an officer of the association, or otherwise participated in holding it out as legally incorporated.[229] But he is not estopped in the case of a preliminary subscription unless he has in some way thus participated in holding the association out as a corporation.[230]

(k) Estoppel in other cases than in action on contract.—The estoppel of one who has dealt with a corporation is not necessarily limited in its operation to cases in which an action is brought against him or by him on the contract, but applies in many other cases.

Thus it has been held that one who has dealt with a pretended corporation and become its creditor is estopped to deny its incorporation for the purpose of attacking an assignment made by it for the benefit of its creditors,[231] or for the purpose of attacking bonds and mortgages previously given by it.[232] A person is estopped to deny the existence of a corporation when, by being a holder of its bonds, he acquires a *locus standi* in a suit brought to foreclose a mortgage made to secure their payment.[233]

A person who takes a lease from an association as a corporation cannot deny its legal incorporation in an action by it to recover the premises.[234] And a person who has effected insurance

[229] Post, § 515.

[230] Post, § 515.

[231] Johnston v. Gumbel (Miss.) 19 So. 100.

Where a corporation has had business dealings with another association, treating it as a corporation, for a considerable length of time, it is estopped to deny its existence as a corporation for the purpose of asserting that assets in its hands belong to the stockholders individually It is estopped to allege, in an action by a receiver of such corporation or association, that it was illegally organized. Rafferty v. Bank of Jersey City, 33 N. J. Law, 368. See, also, Estey Mfg. Co. v Runnels, 55 Mich. 130; Carroll v. Pacific Nat. Bank, 19 Wash. 639.

One who does business with a bank as a corporation, and recognizes its existence in receiving its funds, cannot question the legality of its organization in a suit against him by its receivers. Bank of Circleville v. Renick, 15 Ohio, 322.

[232] Andrews v. National Foundry & Pipe Works, 46 U. S. App. 619, 77 Fed. 744; Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co., 82 Fed. 642; Toledo, St. Louis & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, modifying decree in 86 Fed. 929. See, also, Hasselman v. United States Mortg. Co., 97 Ind. 365.

[233] Wallace v. Loomis, 97 U. S. 146.

[234] Fayetteville Waterworks Co. v. Tillinghast, 119 N. C. 343.

with an association as a corporation, and received from it payments made under the supposed obligation growing out of that contract, will not be permitted to deny that the association is a corporation, when sued by it for the restitution of the money thus paid.[235] One who purchases property from a pretended corporation is estopped to deny its corporate existence in an action against him by a receiver of the corporation to recover the property on the ground that it was transferred when the corporation was insolvent.[236] The effect of conveyances and mortgages to or by a corporation as an estoppel is considered in a subsequent section.

(l) Trusts for corporation.—One who takes property in trust for a corporation, and agrees to convey the same to it, is estopped to allege that the corporation has not been legally organized in order to avoid the trust. And the estoppel operates against persons who claim under him.[237]

(m) Knowledge.—The estoppel of a person who has dealt with a body as a corporation to deny its corporate existence does not depend upon any question of knowledge on his part of its want of incorporation. A person is so estopped by contracting with a pretended corporation, although he may at the time have believed that it was a corporation.[238] As we shall presently see, however, he must know, or be chargeable with knowledge, that it claims to be a corporation.[239]

(n) Persons against whom this estoppel operates.—In the preceding paragraphs we have seen simply that the person dealing with a pretended corporation is estopped to deny its legal incorporation. The operation of the estoppel, however, is by no means limited to such person himself. It operates also as against persons who stand in his shoes. Thus, it clearly operates as against his executor or administrator,[240] and as against one to whom he assigns his contract with the pretended corpora-

[235] Liverpool & London Fire & Life Ins. Co. v. Hunt, 11 La. Ann. 623.

[236] Carroll v. Pacific Nat. Bank, 19 Wash. 639.

[237] Tuckasegee Min. Co. v. Goodhue, 118 N. C. 981.

[238] Ransom v. Priam Lodge No. 145, 51 Ind. 60; Booske v. Gulf Ice Co., 24 Fla. 550.

[239] Post, § 92.

[240] Curtis v. Meeker, 62 Ill. App. 49, affirmed sub nom. Curtis v. Tracy, 169 Ill. 233.

tion,[241] or to whom he sells and conveys property purchased by him from the corporation.[242] One who purchases property at a sale on execution against a person who has purchased it from a pretended corporation under a conditional contract of sale cannot deny the existence of the corporation for the purpose of attacking its retention of the title in the contract.[243] When a person takes the title to land in trust for a pretended corporation under an agreement to convey to it, the estoppel to deny the existence of the corporation for the purpose of avoiding the trust operates against his heirs at law or devisees.[244]

As we shall see, except where there is some privity, as in the cases above mentioned, a person who has in no way dealt with a pretended corporation, as a corporation, cannot be estopped to deny its corporate existence,[245] though he may be prevented from doing so by the doctrine in relation to *de facto* corporations.[246]

(o) **Persons in whose favor this estoppel operates.**—We have seen in the preceding paragraphs under this section that the estoppel against one who has contracted with a pretended corporation operates in favor of the corporation itself when it sues upon the contract,[247] and also in favor of the members or stockholders and officers of the corporation, when it is sought to hold them individually liable on the ground that there was no corporation.[248] It also operates in favor of persons who stand in the shoes of the corporation or its members, stockholders, or officers. Thus, the existence of the corporation cannot be denied as against one to whom it indorses or assigns a note, bond, or other contract made to or with it,[249] or against one to whom it

[241] As the assignee of bonds of a pretended corporation. Wallace v. Loomis, 97 U. S. 146.

[242] Jackson Sharp Co. v. Holland, 14 Fla. 384.

[243] Jackson Sharp Co. v. Holland, 14 Fla. 384.

And a holder of land by assignment of a sheriff's certificate of sale under a mortgage by a corporation is estopped to deny the existence of the corporation in order to defeat a prior mortgage by the same corporation. Hasselman v. United States Mortg. Co., 97 Ind. 365.

[244] Tuckasegee Min. Co. v. Goodhue, 118 N. C. 981.

[245] Post, § 92.

[246] Ante, § 81.

[247] Supra, this section (a).

[248] Supra, this section (g).

[249] Booske v. Gulf Ice Co., 24 Fla. 550; Goodrich v. Reynolds, 31 Ill.

sells and conveys or mortgages land or goods sold or conveyed to it,[250] or as against its assignee in bankruptcy, or its assignee for the benefit of creditors, or receiver.[251]

(p) Estoppel by collection of taxes.—The levy and collection of taxes against a corporation, as such, estops a municipality from denying its corporate existence in an action to recover back the taxes paid.[252]

§ 85. Estoppel by deed.

(a) Conveyances.—Since a party to a deed is estopped to deny the truth of recitals therein, a party to a deed which recites that a certain association is a corporation is estopped to afterwards deny its corporate existence. Thus, where a conveyance of land recites the existence of a mortgage in favor of a corporation, the grantee, or any other person claiming through the deed, is estopped to attack the mortgage on the ground that the mortgagee is not a corporation.[253]

A mortgage to a pretended corporation cannot be avoided, on the ground that it is not legally a corporation, by one who has taken a conveyance of the land and assumed the mortgage debt.[254] And, generally, taking a conveyance of land from an association which assumes to execute the conveyance as a corporation will estop the grantee and those claiming under him from attacking the title of the association at the time of the conveyance on the ground that it was not legally incorporated.[255] In like manner, where a person executes a conveyance, mortgage, or lease to an association as a corporation, neither he nor a

490, 83 Am. Dec. 240; Brickley v Edwards, 131 Ind. 3; Camp v. Byrne, 41 Mo. 525; Andes v. Ely, 158 U. S. 312.

[250] Post, § 85.

[251] Chubb v. Upton, 95 U. S. 665; Johnston v. Gumbel (Miss.) 19 So. 100; Carroll v. Pacific Nat. Bank, 19 Wash. 639.

[252] Monroe Water Co. v. Frenchtown Tp., 98 Mich. 431.

[253] Hasenritter v. Kirchhoffer, 79 Mo. 239. And see Independent Order of Mutual Aid v. Paine, 122 Ill. 625.

[254] People's Sav. Bank & Bldg. Ass'n v. Collins, 27 Conn. 142.

[255] See Calkins v. Bump, 120 Mich. 335.

One who has taken and still relies upon a conveyance of land from a corporation, which, in executing the same, assumed to act as a corporation, cannot deny its legal existence as a corporation in an action against him to recover possession of the land brought by one who has attached the same in an action against the company, as a corporation, prior to the record-

person to whom he afterwards conveys the land, nor his heirs, can avoid the conveyance, mortgage, or lease by denying the corporate existence of the association.[256]

(b) **Bonds.**—An estoppel by deed to deny legal incorporation also operates against a person who executes and delivers a bond payable to a corporation,[257] including a forthcoming bond in an action of replevin,[258] or an attachment bond,[259] or an appeal bond,[260] or who executes, as surety, a bond purporting to be made by a corporation as principal,[261] or who executes a bond guarantying the obligation of an association purporting to be a corporation.[262]

ing of the deed, and has subsequently levied his execution thereon. Dooley v. Wolcott, 4 Allen (Mass.) 406.

One who has purchased property from a pretended corporation cannot deny its corporate existence in an action brought against him by its receiver to recover the property on the ground that the corporation was insolvent and the transfer fraudulent. Carroll v. Pacific Nat. Bank, 19 Wash. 639.

A person who has taken a conveyance from a corporation cannot attack its existence as a corporation for the purpose of defeating a mortgage previously executed by it. Carroll v. Colorado Springs Co., 100 U. S. 55. See, also, Baker v. Neff, 73 Ind. 68; Hasselman v. United States Mortg. Co., 97 Ind. 365.

[256] Smith v. Sheeley, 12 Wall. (U. S.) 358; Grangers' Business Ass'n v. Clark, 67 Cal. 634; Bank of Shasta v. Boyd, 99 Cal. 604; West Winsted Sav. Bank & Bldg. Ass'n v. Ford, 27 Conn. 282, 71 Am. Dec. 66; Eagle Sav. & Loan Co. v. Samuels, 43 App. Div. (N. Y.) 386; Wood v. Kingston Coal Co., 48 Ill. 356, 95 Am. Dec. 554; Independent Order of Mutual Aid v. Paine, 122 Ill. 625; Broadwell v. Merritt, 87 Mo. 95; Ragan v. McElroy, 98 Mo. 349; Reinhard v. Virginia Lead Min. Co., 107 Mo. 616, 28 Am. St. Rep. 441; Bates v. Wilson, 14 Colo. 140; Jones v. Kokomo Bldg. Ass'n, 77 Ind. 340; German Bank v. Stumpf, 6 Mo. App. 17; Whitney v. Robinson, 53 Wis. 309; Franklin v. Twogood, 18 Iowa, 515; Den v. Van Houten, 10 N. J. Law, 270; Franz v. Teutonia Bldg. Ass'n, 24 Md. 259.

That a lessor is thus estopped, see Whitney v. Robinson, 53 Wis. 309.

A deed made to a corporation before its organization inures to its use, after its organization, by way of estoppel against the grantor. Dyer v. Rich, 1 Metc. (Mass.) 180. See, also, Broadwell v. Merritt, 87 Mo. 95.

The grantor of lands to a corporation as such is estopped to deny its corporate existence in an action against him on his covenants in the deed. Wood v. Kingston Coal Co., 48 Ill. 356, 95 Am. Dec. 554.

[257] City of St. Louis v. Shields, 62 Mo. 247.

In a Massachusetts case, giving a bond to a corporation was said to be only prima facie evidence of incorporation. Williamsburg City Fire Ins. Co. v. Frothingham, 122 Mass. 391.

[258] Loaners' Bank of City of New York v. Jacoby, 10 Hun (N. Y.) 143.

[259] Seattle Crockery Co. v. Haley, 6 Wash. 302, 36 Am. St. Rep. 156.

[260] Trogdon v. Cleveland Stone Co., 53 Ill. App. 206.

[261] Jefferson v. McCarthy, 44 Minn. 26.

[262] Hassinger v. Ammon, 160 Pa. St. 245.

§ 86. Estoppel by record.

An estoppel to deny the existence of a pretended corporation may also arise from matter of record, as from a recognizance purporting to be in favor of a corporation,[263] or a judgment either for or against a corporation.[264]

Actions and pleadings.—A person who sues a corporation as such thereby admits the legality of its incorporation, and is estopped from denying it in that suit.[265] And the same is true where a person files a cross bill or petition, or a counterclaim, against a corporation.[266]

By the weight of authority, filing an information in the nature of *quo warranto* against an association in its corporate name, either for the purpose of forfeiting its charter, or for the purpose of ousting it from the exercise of certain powers, is an admission of its corporate existence, and will estop the state

[263] Henriques v. Dutch West India Co., 2 Ld. Raym. 1532.

[264] Andrews v. National Foundry & Pipe Works, 46 U. S. App. 619, 77 Fed. 774; Shields v. Clifton Hill Land Co., 94 Tenn. 123; Georgia Ice Co. v. Porter, 70 Ga. 637; Estey Mfg. Co. v. Runnels, 55 Mich. 130; Trogdon v. Cleveland Stone Co., 53 Ill. 206; Nebraska Nat. Bank of York v. Ferguson, 49 Neb. 109; Pochelu v. Kemper, 14 La. Ann. 308, 74 Am. Dec. 433; McClinch v. Sturgis, 72 Me. 288, 297; Stoutimore v. Clark, 70 Mo. 471, 1 Smith's Cas. 142; Becket v. Uniontown Bldg. & Loan Ass'n, 88 Pa. St. 211.

After a party has recovered a judgment against an association as a corporation, and obtained the appointment of a receiver, he cannot in the same suit deny its corporate existence for the purpose of holding the stockholders liable as partners. First Nat. Bank of Crawfordsville v. Dovetail Body & Gear Co., 143 Ind. 534.

[265] Lester v. Georgia, Carolina & N. R. Co., 90 Ga. 802; First Nat. Bank of Crawfordsville v. Dovetail Body & Gear Co., 143 Ind. 534; Ward v. Minnesota & Northwestern R. Co., 119 Ill. 287; Lincoln Coal Min. Co. v. McNally, 15 Ill. App. 181; Pochelu v. Kemper, 14 La. Ann. 308, 74 Am. Dec. 433; Kennebec & P. R. Co. v. Portland & K. R. Co., 59 Me. 9; McClinch v. Sturgis, 72 Me. 288, 297; Hinsdale v. Larned, 16 Mass. 65; Nebraska Nat. Bank of York v. Ferguson, 49 Neb. 109; Kuypers v. Reformed Dutch Church, 6 Paige (N. Y.) 570; People v. Ravenswood, H. C. & W. Turnpike & Bridge Co., 20 Barb. (N. Y.) 518. And see Howard v. La Crosse & Milwaukee R. Co., 1 Woolw. 49, Fed. Cas. No. 6,760.

The fact that a party has sued an association as a corporation on a contract does not estop him from denying its incorporation in a subsequent suit thereon against another, where the first suit was abandoned on learning that the defendant was not a corporation. Rohan Bros. Boiler Mfg. Co. v. Richmond, 14 Mo. App. 595.

[266] Ward v. Minnesota & Northwestern R. Co., 119 Ill. 287; McKnight v. Town of Mineral Point, 1 Pin. (Wis.) 99; Black River Imp. Co. v. Holway, 85 Wis. 344.

from afterwards claiming that it had not been legally incorporated.[267]

In an action by a corporation, the defendant cannot deny the plaintiff's existence as a corporation after admitting it by his plea or answer, and he admits its corporate existence by going to trial on the merits or pleading to the merits, instead of pleading want of incorporation.[268]

Suing and recovering a judgment against a corporation does not estop the creditor from enforcing a liability imposed by statute upon officers or stockholders for debts contracted before recording the certificate of incorporation, for this is not inconsistent with the existence of the corporation.[269]

Estoppel of corporation.—When an association, sued as a corporation, appoints an attorney, and an appearance is entered by him, this is an admission of record of the corporate existence of the defendant.[270] A defendant sued as a corporation cannot deny its own existence, either in abatement or in bar. If it is not a corporation, it cannot, as such, appear and plead.[271]

§ 87. Estoppel by holding out pretended corporation.

(a) In general.—We have considered the estoppel to deny the existence of a corporation resulting from dealing with it as a

[267] North & South Rolling Stock Co. v. People, 147 Ill. 234; State v. Commercial Bank of Manchester, 33 Miss. 474; State v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 262; Com. v. New York, Lake Erie & W. Coal & R. Co., 10 Pa. Co. Ct. R. 129. Compare People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172.

[268] West Winsted Sav. Bank & Bldg. Ass'n v. Ford, 27 Conn. 282, 71 Am. Dec. 66; Inhabitants of Sutton v. Cole, 3 Pick. (Mass.) 232, 245; Ward v. Minnesota & Northwestern R. Co., 119 Ill. 287; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526; School Dist. No. 1 v. Blaisdell, 6 N. H. 197; Lillard v. Porter, 2 Head (Tenn.) 177; Bank of Manchester v. Allen, 11 Vt. 302; Washington Mill Co. v. Craig, 7 Wash. 556; National Mut. Bldg. & Loan Ass'n v. Ashworth, 91 Va. 706.

[269] Loverin v. McLaughlin, 161 Ill. 417; ante, § 84(h), (i).

[270] Oxford Iron Co. v. Spradley, 46 Ala. 98; Western Union Tel. Co. v. Eyser, 2 Colo. 141; Supreme Lodge, A. O. U. W., v. Zuhlke, 30 Ill. App. 98; A. Gauthier Decorating Co. v. Ham, 3 Colo. App. 559; Jones v. Trustees of Mt. Zion Congregation, 30 La. Ann. 711; Seaton v. Chicago, Rock Island & P. R. Co., 55 Mo. 416; Smith v. Burlington & M. R. R. Co., 55 Mo. 526; Sappington v. Missouri Pac. R. Co., 14 Mo. App. 86; Rush v. Halcyon Steamboat Co., 84 N. C. 702.

[271] Western Union Tel. Co. v. Eyser, 2 Colo. 141.

corporation, and thereby admitting its incorporation. Another ground upon which estoppel to deny corporate existence may be based is the holding out of an association as a corporation, and thereby representing that it is legally incorporated. As a general rule, one who participates in holding out an association as a corporate body, and thereby induces persons to deal with it as such, is estopped to deny his representation to their prejudice. Such an estoppel may arise against the promoters, members, or stockholders of a pretended corporation, the directors or other officers, or the pretended corporation itself.

(b) Estoppel of promoters and stockholders or members—(1) In general.—A person who has participated in promoting, or who has become a stockholder or member of, a pretended corporation, and thus participated in holding it out to the world as a corporation, is estopped to deny its corporate existence as against its creditors for the purpose of escaping statutory liability for its debts;[272] or as against the holder of bonds of the corporation secured by a mortgage given by it;[273] or as against the holder of a note given by him to the pretended corporation in payment of his subscription to its capital stock, and in many other cases.[274] And as we shall see, the members collectively are estopped in an action against them as a corporation.[275]

[272] Casey v. Galli, 94 U. S. 673; McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 401; Keyser v. Hitz, 2 Mackey (D. C.) 473; Corwith v. Culver, 69 Ill. 502; Wheelock v. Kost, 77 Ill. 296; McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Dows v. Naper, 91 Ill. 44; Haynes v. Brown, 36 N. H. 545; Ossipee Hosiery & Woolen Mfg. Co. v. Canney, 54 N. H. 295; Seaton v. Grimm (Iowa) 81 N. W. 225; Slocum v. Providence Steam & Gas Pipe Co., 10 R. I. 112, 1 Smith's Cas. 134; Slocum v. Warren, 10 R. I. 116, 1 Smith's Cas. 136; Gardner v. Minneapolis & St. Louis R. Co., 73 Minn. 517. And see post, §

[273] Phinizy v. Augusta & Knoxville R. Co., 62 Fed. 678; Farmers' Loan & Trust Co. v. Toledo, Ann Arbor & N. M. Ry. Co., 67 Fed. 49.

[274] Camp v. Byrne, 41 Mo. 525; Marsh v. Mathias, 19 Utah, 350.

A promoter and stockholder of an association which has acted as a corporation after an unsuccessful attempt to incorporate, and has made contracts as such, is estopped to deny its incorporation by an action treating it as a partnership, although the attempt to incorporate may have been an absolute nullity as to third persons. Anderson v. Thompson, 51 La. Ann. 727.

Participation in organizing the pretended corporation is not necessary. One who purchases stock in a pretended corporation after its formation is estopped to deny its corporate existence equally with the original stockholders. Palmer v. Lawrence, 3 Sandf. (N. Y.) 161.

[275] Georgia Ice Co. v. Porter, 70

To give rise to an estoppel against stockholders or members participating in holding out a pretended corporation as having a legal existence, it is not necessary that there shall be either bad faith, willful wrong, or gross carelessness.[276]

——**(2) Liability on subscriptions to stock.**—A stockholder in a corporation may be estopped to deny its corporate existence because of the fact that by his subscription he recognizes its corporate existence.[277] Or, particularly as against creditors, he may be estopped because he participates in holding out the corporation as legally organized. The question will be fully treated in another chapter.[278]

(c) Estoppel of officers.—A person who has acted as an officer of a pretended corporation, either as director or as president, or in any other capacity, and has thus participated in holding out the corporation as having a legal existence, is estopped to deny such existence.[279] Thus, a person who has made a conveyance of land as officer of a pretended corporation cannot set up want of incorporation for the purpose of attacking the title of the grantee or those claiming under him.[280] And a person who has acted as an officer of a pretended corporation cannot deny its corporate existence for the purpose of escaping liability on his subscription to its capital stock,[281] or a liability imposed upon him as officer or stockholder by statute.[282]

(d) Estoppel as between members, or officers and members.—The estoppel to deny corporate existence by reason of recogni-

Ga. 637; Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511; State v. Simonton, 78 N. C. 57; post, § 87(e).

[276] Canfield v. Gregory, 66 Conn. 9; Callender v. Painesville & Hudson R. Co., 11 Ohio St. 516, 1 Smith's Cas. 144 (as to which, see infra, note 286).

[277] Ante, § 84(j).

[278] Post, § 515; Hamilton v. Clarion, Mahoning & P. R. Co., 144 Pa. St. 34; Torras v. Raeburn, 108 Ga. 345.

[279] Close v. Glenwood Cemetery, 107 U. S. 466; Bates v. Wilson, 14 Colo. 140; Curtis v. Tracy, 169 Ill. 233, affirming Curtis v. Meeker, 62 Ill. App. 49; Beal v. Bass, 86 Me. 325; Smith v. Heidecker, 39 Mo. 157; Macfarland v. West Side Imp. Ass'n, 53 Neb. 417; Haynes v. Brown, 36 N. H. 545, 561; Weinman v. Wilkinsburg & E. L. P. Ry. Co., 118 Pa. St. 192; Seaton v. Grimm (Iowa) 81 N. W. 225.

[280] Close v. Glenwood Cemetery, 107 U. S. 466.

[281] Corwith v. Culver, 69 Ill. 502; Musgrave v. Morrison, 54 Md. 161; Smith v. Heidecker, 39 Mo. 157; Macfarland v. West Side Imp. Ass'n, 53 Neb. 417; post, § 515.

[282] Corwith v. Culver, 69 Ill. 502;

tion, or of participation in holding out a pretended corporation, may operate as between the members, or the members and officers, of the pretended corporation. Thus it has been held by some courts that the directors of a pretended corporation cannot deny its corporate existence for the purpose of holding the stockholders liable to contribution as partners, even though the association is not a *de facto* corporation,[283] and that an officer or participating stockholder cannot deny organization for the purpose of holding officers liable individually on a note executed to him by them as officers.[284] It has also been held that a member of a benevolent association pretending to be a corporation cannot deny its corporate existence for the purpose of holding the other members liable as individuals on a contract made by him with the association.[285]

(e) Estoppel of pretended corporation or members collectively—(1) In general.—The doctrine in relation to estoppel to deny corporate existence operates, not only as against persons dealing with a corporation, or pretended corporation, and as against members and officers individually, but also as against the members collectively, or, in other words, against the pretended corporation itself. If a body of men assume to act as a corporation, and enter into a contract as such, they cannot deny their legal existence as a corporation in an action against them, as such, on the contract.[286] For this reason, it has been held

Gay v. Kohlsaat, 80 Ill. App. 178. See post, chapter xxiv.

[283] Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 1 Smith's Cas. 112; Heald v. Owen, 79 Iowa, 23. Contra, Richardson v. Pitts, 71 Mo. 128. See ante, § 84(g).

[284] Curtis v. Tracy, 169 Ill. 233, affirming Curtis v. Meeker, 62 Ill. App. 49.

[285] Foster v. Moulton, 35 Minn. 458.

[286] United States: Aller v. Town of Cameron, 3 Dill. 198, Fed. Cas. No. 243; Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801; Farmers' Loan & Trust Co. v. Toledo, Ann Arbor & N. M. Ry. Co., 67 Fed. 49; Phinizy v. Augusta & Knoxville R. Co., 62 Fed. 678; Blackburn v. Selma, Marion & M. R. Co., 2 Flip. 525, Fed. Cas. No. 1467.

Alabama: McCullough v. Talladega Ins. Co., 46 Ala. 376.

Colorado: Grand River Bridge Co. v. Rollins, 13 Colo. 4.

Delaware: Brady v. Delaware Mut. Life Ins. Co., 2 Penn. (Del.) 237.

Georgia: Southern Bank of Georgia v. Williams, 25 Ga. 534; McDougald v. Lane, 18 Ga. 444; McDougald v. Bellamy, 18 Ga. 411; Georgia Ice Co. v. Porter, 70 Ga. 637; Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511.

Illinois: Independent Order of

that a corporation which has fully perfected its organization,

Mutual Aid v. Paine, 122 Ill. 625; Fitzpatrick v. Rutter, 160 Ill. 282; United States Exp. Co. v. Bedbury, 34 Ill. 459; Grand Lodge Brotherhood of Locomotive Firemen v. Cramer, 60 Ill. App. 212.

Indiana: Ewing v. Robeson, 15 Ind 26.

Iowa: Humphrey v. Patrons' Mercantile Ass'n, 50 Iowa, 607.

Maine: Beal v. Bass, 86 Me. 325

Maryland: (See infra, in this note).

Massachusetts: Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282, 288, 1 Smith's Cas. 138; Dooley v. Cheshire Glass Co., 15 Gray (Mass.) 494, 1 Cum. Cas. 418; Merrick v. Reynolds Engine & Governor Co., 110 Mass. 381; Kelley v. Newburyport & A. H. R. Co., 141 Mass. 496.

Michigan: Empire Mfg. Co v. Stuart, 46 Mich. 482.

Minnesota: Jewell v. Grand Lodge, A. O. U. W., 41 Minn. 405; Scheufler v. Grand Lodge, A. O. U. W., 45 Minn 256.

Missouri: Roll v. St. Louis & C. Smelting & Mining Co., 52 Mo. App. 60.

New York: Abbott v. Aspinwall, 26 Barb. (N. Y.) 202.

North Carolina: Rush v. Halcyon Steamboat Co., 84 N. C. 702; Dobson v. Simonton, 86 N. C. 492; State v. Simonton, 78 N. C. 57.

Ohio: Callender v. Painesville & Hudson R. Co., 11 Ohio St. 516, 1 Smith's Cas. 144.

Pennsylvania: Hamilton v. Clarion, Mahoning & P. R. Co., 144 Pa. St. 34.

South Carolina: Johnston v. South Western Railroad Bank, 3 Strob. Eq. (S. C.) 263.

Utah: Liter v. Ozokerite Min. Co., 7 Utah, 487.

Vermont: Stone v. East Berkshire Congregational Soc., 14 Vt. 86.

West Virginia: Anderson v. Kanawha Coal Co., 12 W. Va. 526; Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764.

Wisconsin: Williams v. Stevens' Point Lumber Co., 72 Wis. 487.

In Callender v. Painesville & Hudson Co., 11 Ohio St. 516, 1 Smith's Cas. 144, it was held that neither the members of an association who had acted as a corporation, even though under a belief that they were incorporated, and entered into a written contract as such, nor its officers, could deny that it was regularly incorporated, to defeat an action against it as a corporation on the contract. "Under such circumstances," said Judge Sutliff, "the members of the company, and especially the officers of the company, are estopped to deny its existence as a corporation. However mistaken in fact, no person, whether artificial or natural, is permitted to so conduct and represent himself as to induce reasonable men, at his instance, to act upon the truth of his representations in their contracts and dealings with him, and to then deny the truth of such representations, to the prejudice of the party so having relied upon them. * * * To suffer the defendants to repudiate their conduct and deny the truth of their representations, by which the plaintiffs had been induced to contract with them, and upon which both parties had acted, would be in contravention of those principles of equity upon which the doctrine of estoppel rests, and its operative effect to prevent fraud depends. We are, therefore, clearly of opinion that, the company and its members, who had so held themselves out to be a corporation, were estopped to deny that fact, for any defect whatsoever, if the same had in fact existed in their charter."

In accordance with this principle, if an association acts as an incorporated insurance company, and issues a policy in its corporate name, it cannot deny its corporate existence in an action on the policy. Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764;

and acquired a legal existence, cannot avoid contracts made by it as a corporation before its organization.[287]

——(2) **Taxation.**—In like manner, an association which has assumed to act as a corporation, and has acquired property, cannot escape liability for taxes on the ground that it has no legal existence as a corporate body.[288]

Brady v. Delaware Mut. Life Ins. Co., 2 Penn. (Del.) 237.

And an association is estopped to deny its corporate existence to defeat an action on an appeal bond given by it as a corporation. East Tennessee & Georgia R. Co. v. Evans, 6 Heisk. (Tenn.) 607.

In Maryland this doctrine has been repudiated. It was there held that an association which held itself out as a corporation, and contracted as such, was not estopped, in an action against it on the contract, to deny their corporate existence on the ground that they had failed to comply with the requirements of the law in organizing. "We think," said the court, "it would be extending the doctrine of estoppel to an extent not justified by the principles of public policy to allow it to operate through the conduct of the parties concerned, to create substantially a de facto corporation, with just such powers as the parties may by their acts give to it. This would be substituting the dealings of the parties for compliance with the requirements of the law, and giving to them the same effect through the aid of the courts. Thus, virtually, through the courts, recognizing the existence of the corporation, in manifest disregard of the written law." Boyer v. Trustees of Towsontown Station of M. E. Church, 46 Md. 359, 1 Smith's Cas. 146. Compare, however, Grape Sugar & Vinegar Mfg. Co. v. Small, 40 Md. 395.

In this case, the court clearly takes a wrong view of the requirements of public policy. It is much the better policy to apply the doctrine of estoppel in such cases, and thus prevent fraud upon the part of persons assuming to act as a corporation, when they have failed to comply with the statutory requirements in their organization,—a circumstance of which it is not reasonable to require persons dealing with the association to inform themselves, and a circumstance of which most persons, if they knew of it, would not appreciate the legal effect. In the above case, the defect consisted merely in the fact that the certificate or agreement of incorporation was acknowledged before one justice of the peace, instead of two justices or a judge, as required by the statute. Public policy clearly requires that the members of an association shall be estopped to set up such a defect in organization as a corporation as against persons contracting with it in good faith, especially in view of the fact that the attorney general may at any time institute proceedings to oust them from the exercise of corporate powers.

[287] Independent Order of Mutual Aid v. Paine, 122 Ill. 625; Empire Mfg. Co. v. Stuart, 46 Mich. 482; Georgia Ice Co. v. Porter, 70 Ga. 637, 641; McDougald v. Bellamy, 18 Ga. 411; Grand River Bridge Co. v. Rollins, 13 Colo. 4.

Where a pretended corporation had carried on business, and held itself out to the public as a corporation, before it was organized according to law, it was held that its assets should be held liable for its debts incurred prior to organization, and that judgments for such debts prior to its organization were superior to mortgages executed by it after organization. Bergen v. Porpoise Fishing Co., 41 N. J. Eq. 238.

[288] Atlanta & R. Air-Line R. Co.

——(3) **Expiration of charter or dissolution.**—This rule, however, does not prevent a corporation from denying the cessation of its corporate functions, either by expiration of its charter, or by judgment of dissolution, after the making of the contract, and before the commencement of the action thereon.[289]

§ 88. Necessity for equitable grounds of estoppel, and effect of fraud.

The doctrine in relation to estoppel to deny corporate existence by reason of recognition of a pretended corporation by dealing with it rests upon the ground that such dealing creates relations and encourages conduct which there may be difficulty in undoing, or which it would be inequitable to undo.[290] It originates in equitable principles, and therefore it does not apply when it would be inequitable to apply it, or where equitable principles do not require its application, as in the case of fraud.[291] It was held, therefore, by the supreme court of Michigan, that it did not apply where no new rights had intervened, and where the recognition of the pretended corporation was itself brought about by fraudulent dealings carried on for the very purpose of entrapping the party into the action on which such recognition was rested. "If there was no corporation in fact," said the court, "and if there are no facts which make it legally unjust to forbid its denial, it is difficult to understand what room there is for estoppel."[292]

To render it inequitable to hold a person who has dealt with an association as a corporation estopped to set up fraud in its organization, or in obtaining its charter, the fraud must affect him. Thus, the fraudulent organization of a corporation, or fraud in obtaining its charter, cannot be set up as a defense against an action on an acceptance in favor of the corporation.[293]

v. State, 63 Ga. 483. See, also, post, § 292.

[289] Dobson v. Simonton, 86 N. C. 492.

[290] Doyle v. Mizner, 42 Mich. 332. And see Estey Mfg. Co. v. Runnels, 55 Mich. 130; Montgomery v. Forbes, 148 Mass. 249, 2 Keener's Cas. 1945, 1 Cum. Cas. 69, 1 Smith's Cas. 94.

[291] Doyle v. Mizner, 42 Mich. 332; Williams v. Hewitt, 47 La. Ann. 1076; Krutz v. Paola Town Co., 20 Kan. 403; Judah v. American Live Stock Ins. Co., 4 Ind. 333; Chicago & Grand Trunk R. Co. v. Miller, 91 Mich. 166.

[292] Doyle v. Mizner, 42 Mich. 332.

[293] Southern Bank of Georgia v.

§ 89. Necessity for de facto corporate existence.

In an Indiana case it has been held that the doctrine of estoppel to deny the existence of a corporation rests upon the doctrine in relation to *de facto* corporations, and that "the estoppel goes to the mere *de facto* organization, not to the question of legal authority to make an organization."[294] And in a Colorado case it was said that "the doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a *de facto* existence."[295] In many other cases, this seems to be so assumed.[296]

This view, however, cannot be sustained. The doctrine in relation to estoppel is based upon the ground that it would generally be inequitable to permit the corporate existence of an association to be denied by persons who have represented it to be a corporation, or held it out as a corporation, or by persons who have recognized it as a corporation by dealing with it as such; and by the overwhelming weight of authority, therefore, a person may be estopped to deny the legal incorporation of an association which is not even a corporation *de facto*.[297]

Williams, 25 Ga. 534. And see Pattison v. Albany Bldg. & Loan Ass'n, 63 Ga. 373; State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405; Jones v. Dana, 24 Barb. (N. Y.) 395.

[294] Perkins, J., in Heaston v. Cincinnati & Ft. Wayne R. Co., 16 Ind. 275, 79 Am. Dec. 430, 1 Cum. Cas. 417 See, also, Harriman v. Southam, 16 Ind. 190; Gillespie v. Ft. Wayne & Southern R. Co., 17 Ind. 243; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415, 1 Smith's Cas. 117.

[295] Jones v. Aspen Hardware Co., 21 Colo. 263, 268. See, also, Empire Mills v Alston Grocery Co., 4 Willson, Civ. Cas. Ct. App. (Tex.) § 221.

[296] See, for example, Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120, 133; Snider's Sons' Co. v. Troy, 91 Ala. 224, 231, 24 Am. St. Rep. 887, 1 Smith's Cas. 104; Cory v. Lee, 93 Ala. 468; Bibb v. Hall, 101 Ala. 79, 97; Humphreys v. Mooney, 5 Colo. 282; Wheelock v. Kost, 77 Ill. 296; Winget v. Quincy Bldg. & Homestead Ass'n, 128 Ill. 67, 84; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 74, 1 Smith's Cas. 112; Swartwout v. Michigan Air Line R. Co., 24 Mich. 389; Merchants' & Manufacturers' Bank v. Stone, 38 Mich. 779; Stout v. Zulick, 48 N. J. Law, 599, 1 Cum. Cas. 989; Whitford v. Laidler, 94 N. Y. 151, 46 Am. Rep. 131.

[297] Casey v. Galli, 94 U. S. 673, 680; Close v. Glenwood Cemetery, 107 U. S. 466, 477; McGowan v. American Pressed Tan Bark Co., 121 U. S. 575, 593; Lehman v. Warner, 61 Ala. 455, 466; McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 401; Schloss v. Montgomery Trade Co., 87 Ala. 411, 414, 13 Am. St. Rep. 51; Fresno Canal & Irr. Co. v. Warner, 72 Cal. 379, 383; Bates v. Wilson, 14 Colo. 140, 158; McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Dows v. Naper, 91 Ill. 44; Corey v. Morrill, 61 Vt. 598;

"One who deals with a corporation as existing in fact," said Mr. Justice Gray, in the supreme court of the United States, "is estopped to deny as against the corporation that it has been legally organized."[298] Here there is clearly no requirement that the corporation shall have a *de facto* existence as such. And certainly a *de facto* corporate existence is not necessary in order that a stockholder in a pretended corporation may be estopped to deny its existence in a suit by a receiver or assignee in bankruptcy to enforce his statutory liability. It was said by Mr. Justice Swayne, in such a case in the supreme court of the United States: "Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it."[299]

§ 90. Necessity for lawful authority.

Some courts have held, on the theory that the doctrine of estoppel is limited to *de facto* corporations, that there is no estoppel to deny the existence of a pretended corporation, where there is no law under which it might exist, or, what amounts to the same thing, if the statute under which it claims to exist is un-

Spahr v. Farmers' Bank, 94 Pa. St. 429; Minnesota Gaslight Economizer Co. v. Denslow, 46 Minn. 171; Camp v. Byrne, 41 Mo. 525, 535; Miller v. Newburg Orrel Coal Co., 31 W. Va. 836, 2 Keener's Cas. 1929; Building & Loan Ass'n of Dakota v. Chamberlain, 4 S. D. 271; Freeland v. Pennsylvania Cent. Ins. Co., 94 Pa. St. 504; Weinman v. Wilkinsburg & E. L. P. Ry. Co., 118 Pa. St. 192; Gardner v. Minneapolis & St. Louis R. Co., 73 Minn. 517.

[298] Close v. Glenwood Cemetery, 107 U. S. 466, 477. And see, to the same effect, Lehman v. Warner, 61 Ala. 455, 466; McGowan v. American Pressed Tan Bark Co., 121 U. S. 575, 593.

[299] Casey v. Galli, 94 U. S. 673, 680.

constitutional.[300] This view, however, cannot be sustained on principle, and is contrary to the weight of authority. The doctrine of estoppel to deny incorporation does not depend at all on the right to be a corporation, or on the existence of a corporation *de facto,* and therefore persons who hold themselves out as a corporation, or who deal with a pretended corporation, may be estopped to deny incorporation, whether there is any valid law authorizing such a corporation or not.[301]

For example, a stockholder in a pretended corporation is estopped to set up the unconstitutionality of the statute under which corporate existence has been claimed, for the purpose of escaping constitutional or statutory liability for its debts.[302] It has also been held that one may be estopped to deny the existence of a corporation, though its existence has been claimed under a territorial act which is void because it has not been approved by congress,[303] or because it is in violation of an act of congress;[304] and that a person contracting with an association as a corporation after expiration of its charter is estopped to deny its corporate existence,[305] though, under such circumstances, it

[300] Brandenstein v. Hoke, 101 Cal. 131; Heaston v. Cincinnati & Ft. Wayne R. Co., 16 Ind. 275, 79 Am. Dec. 430, 1 Cum. Cas. 417; Harriman v. Southam, 16 Ind. 190; Gilespie v. Ft. Wayne & Southern R. Co., 17 Ind. 243; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415, 1 Smith's Cas. 117, overruling Evansville, I. & C. Straight Line R. Co. v. City of Evansville, 15 Ind. 395. And see Hurlbut v. Britain, 2 Doug. (Mich.) 191; Eaton v. Walker, 76 Mich. 579; Jones v. Aspen Hardware Co., 21 Colo. 263.

[301] Smith v. Sheeley, 12 Wall. (U. S.) 358; McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 401; McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Dows v. Naper, 91 Ill. 44; Winget v. Quincy Bldg. & Homestead Ass'n, 128 Ill. 67; East Pascagoula Hotel Co. v. West, 13 La. Ann. 545; Minnesota Gaslight Economizer Co. v. Denslow, 46 Minn. 171; Gardner v. Minneapolis & St. Louis Ry. Co., 73 Minn. 517; St. Louis Gas Light Co. v. City of St. Louis, 84 Mo. 202; City of St. Louis v. Shields, 62 Mo. 247; Platte Valley Bank v. Harding, 1 Neb. 461; Coxe v. State, 144 N. Y. 396; Freeland v. Pennsylvania Central Ins. Co., 94 Pa. St. 504; Weinman v. Wilkinsburg & E. L. P. Ry. Co., 118 Pa. St. 192; Building & Loan Ass'n of Dakota v. Chamberlain, 4 S. D. 271; Corey v. Morrill, 61 Vt. 598; Black River Imp. Co. v. Holway, 85 Wis. 344. See, also, McClinch v. Sturgis, 72 Me. 288. Compare dictum in Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695, and Cory v. Lee, 93 Ala. 468.

[302] McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 401.

[303] Smith v. Sheeley, 12 Wall. (U. S.) 358.

[304] Platte Valley Bank v. Harding, 1 Neb. 461.

[305] St. Louis Gas Light Co. v. City of St. Louis, 84 Mo. 202.

is not in the position of a corporation *de facto*.[306] As was shown in a previous section, some courts go so far as to hold that there may be a *de facto* corporation under an unconstitutional law.[307]

§ 91. Corporations prohibited by statute or by public policy.

The doctrine in relation to estoppel to deny corporate existence does not apply where a pretended corporation is expressly prohibited by statute, or where it is contrary to public policy.[308] For example, a stockholder in a pretended corporation is not estopped to set up the fact that its existence is in violation of an express constitutional prohibition, in order to avoid liability on his subscription.[309] And where it is attempted to organize and do business as a banking corporation in violation of an express statutory prohibition, an employe of the pretended corporation, and the sureties on his bond, are not estopped in an action by the pretended corporation on the bond.[310]

§ 92. Necessity for recognition or holding out of pretended corporation.

(a) In general.—The doctrine in relation to estoppel to deny the corporate existence of an association is always based upon some conduct showing either recognition of the association as a corporation, or an express or implied representation that it is a corporation, and it cannot apply, therefore, to one who has not dealt with the association, or in any way recognized it as having a corporate existence, or in any way participated in holding it out as a corporation. One may be prevented, by the doctrine in relation to *de facto* corporations, from questioning a corporation's existence without any such conduct on his part, but he cannot be estopped if there is no *de facto* corporation.[311]

Thus, a person claiming title to land by adverse possession

[306] Bradley v. Reppell, 133 Mo. 545, 1 Smith's Cas. 127; ante, § 82(c)(4).

[307] Ante, § 82(c).

[308] Workingmen's Accommodation Bank v. Converse, 29 La. Ann. 369; St. Louis Colonization Ass'n v. Hennessy, 11 Mo. App. 555. And see Empire Mills v. Alston Grocery Co., 4 Willson, Civ. Cas. Ct. App. (Tex.) § 221.

[309] St. Louis Colonization Ass'n v. Hennessy, 11 Mo. App. 555.

[310] Workingmen's Accommodation Bank v. Converse, 29 La. Ann. 369.

[311] Marion Sav. Bank v. Dunkin, 54 Ala. 471; Schloss v. Montgom-

cannot be estopped to attack a conveyance of the land to a pretended, but not *de facto,* corporation, which he has in no way recognized.[312] A person who draws a bill of exchange for the accommodation of the acceptor is not estopped to deny the corporate existence of a bank by which the bill is discounted without his participation, consent, or knowledge.[313] Nor, at least in the absence of recognition or holding out, is there any estoppel to deny the corporate existence of an association to defeat its attempt to condemn land under the power of eminent domain, or to collect assessment for benefits to land from the construction of its works.[314]

(b) What constitutes recognition.—Recognition of an association as a corporation is not necessarily to be implied from the mere fact of dealing with it, for it may be dealt with as an unincorporated association. A person, therefore, who deals with the agent of an association, is not thereby estopped to deny that it is a corporation, where he does not know that it claims to be a corporation, but supposes that it is doing business as an unincorporated association.[315] The fact that the plaintiff in a former suit recognized the defendants as forming a company, without any reference to their having been regularly incorporated, is not such an admission as will estop him from showing that they have no legal existence as a corporation, for, "in order to estop * * * there should, at least, be an admission that the company was entitled to exercise corporate rights and privileges."[316]

ery Trade Co., 87 Ala. 411, 13 Am. St. Rep. 51; Cook County v. Chicago Industrial School for Girls, 125 Ill. 540; Field v. Cooks, 16 La. Ann. 153; Piper v. Rhodes, 30 Ind. 309; Martin v. Fewell, 79 Mo. 401, 1 Cum. Cas. 982; Bradley v. Reppell, 133 Mo. 545, 1 Smith's Cas. 127; Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340; McVicker v. Cone, 21 Or. 353; Guckert v. Hacke, 159 Pa. St. 303; Eaton v. Walker, 76 Mich. 579; Rust-Owen Lumber Co. v. Wellman, 10 S. D. 122.

[312] Bradley v. Reppell, 133 Mo. 545, 1 Smith's Cas. 127.

[313] Marion Sav. Bank v. Dunkin, 54 Ala. 471.

[314] Piper v. Rhodes, 30 Ind. 309; Busenback v. Attica & B. Gravel Road Co., 43 Ind. 265; ante, § 81 (i), (j).

[315] Martin v. Fewell, 79 Mo. 401, 1 Cum. Cas. 982; Eaton v. Walker, 76 Mich. 579; Rust-Owen Lumber Co. v. Wellman, 10 S. D. 122. Compare Stoffiet v. Strome, 101 Mich. 197.

[316] Field v. Cooks, 16 La. Ann. 153.

In other words, to give rise to an estoppel on the ground of recognition by dealing with a pretended corporation, it must have been dealt with or treated *as a corporation.* If the conduct of the party is just as consistent with the existence of an unincorporated association as with the existence of a corporation, there is no estoppel.[317] The fact that the defendant, in an action by an officer of a bank on a note, sets up that the plaintiff is president of the bank, and, as such, could not acquire notes coming to his hands as president, and that the note belongs to the bank, does not estop him to afterwards deny that the banking association is incorporated, for this might just as well be said of an unincorporated bank and its president.[318]

In an Alabama case, it was held that, in an action by a corporation, suing as such, against a subscriber to its capital stock before incorporation, the payment by the defendant of former installments as called for, and an averment that the installment sued for was "duly and regularly called in by plaintiff, and demand therefor made upon defendant," did not, without more, show an estoppel against the defendant to deny the organization and corporate existence of the plaintiff, as it did not appear that the call was made even under color of corporate organization or capacity, and the payment made did not imply a recognition of corporate existence. It was not inconsistent with a payment preliminary to, or in anticipation of, organization.[319]

(c) Name implying claim of corporate existence.—In some of the cases it has been held that making a note or other contract to an association, or taking one from it, in a name which is ordinarily, though not necessarily, taken as implying a corpora-

[317] Schloss v Montgomery Trade Co., 87 Ala. 411, 13 Am. St. Rep. 51; Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340; Garnett v. Richardson, 35 Ark. 144; Duke v. Taylor, 37 Fla. 64; Field v. Cooks, 16 La. Ann. 153; Williams v. Hewitt, 47 La. Ann. 1076; Trustee, etc., of First Society of Newark M. E. Church v. Clark, 41 Mich. 730; Fredenburg v. Lyon Lake M. E. Church, 37 Mich 476; Eaton v. Walker, 76 Mich. 579; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; De Witt v. Hastings, 69 N. Y. 518; McVicker v. Cone, 21 Or. 353; Guckert v. Hacke, 159 Pa. St. 303.

[318] Williams v. Hewitt, 47 La. Ann. 1076, 1084.

[319] Schloss v. Montgomery Trade Co., 87 Ala. 411, 13 Am. St. Rep. 51.

tion, does not even *prima facie* estop one from denying that the association is a corporation, where there is no recital in the contract that it is a corporation, since an unincorporated association may thus do business in a name which would be appropriate to a corporation.[320] The better opinion, however, is to the contrary,—that is, to the effect that there is at least a *prima facie* admission and estoppel, if the name used is one which is generally considered as importing a corporation, rather than a mere unincorporated association.[321]

[320] Thus it was held that there was no estoppel of a person who took a note signed: "Florida Orange Hedge Fence Company, by its President, Jno. W. Childress, James A. Knox, as Secretary and Treasurer."

And it was held that a person was not estopped by selling goods to "The Hot Springs Ice Company." Garnett v. Richardson, 35 Ark. 144.

The same was held of a person contracting with "The Bone Black Company," Field v. Cook, 16 La. Ann. 153; and of a person depositing in a bank doing business under the name of "Traders' Bank," Williams v. Hewitt, 47 La. Ann. 1076.

See, also, Cunyus v. Guenther, 96 Ala. 564; Eaton v. Walker, 76 Mich. 579 (contract with "Walker, Hopkins & Co."); Rust-Owens Lumber Co. v. Wellman, 10 S. D. 122 (contract with a "bridge company"); Guckert v. Hacke, 159 Pa. St. 303 (contract with "Hughes & Gawthrop Co."); McVicker v. Cone, 21 Or. 353; Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539.

[321] Thus it was held that a person making a note to "The Platte Valley Bank" was estopped to deny that it was legally incorporated. Platte Valley Bank v. Harding, 1 Neb. 461. And see Exchange Nat. Bank v. Capps, 32 Neb. 242, 29 Am. St. Rep. 433.

And the same has been held of a person making a note to the "Missouri City Savings Bank," Stoutimore v. Clark, 70 Mo. 471, 1 Smith's Cas. 142; to "Studebaker Brothers' Manufacturing Co.," Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; or to a railroad, insurance, or manufacturing company, Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Nashua Fire Ins. Co. v. Moore, 55 N. H. 48; Montgomery R. Co. v. Hurst, 9 Ala. 513; Johnson Harvester Co. v. Clark, 30 Minn. 308.

See, also, Brown v. Scottish American Mortg. Co, 110 Ill. 235; Trodgen v. Cleveland Stone Co., 53 Ill. App 206; Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29; Bank of Galliopolis v. Trimble, 6 B. Mon. (Ky.) 599; Williams v. Cheney, 3 Gray (Mass.) 215; Estey Mfg. Co. v. Runnels, 55 Mich. 130; Minnesota Gaslight Economizer Co. v. Denslow, 46 Minn. 171; Dutchess County Manufactory v. Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; Grande Ronde Lumber Co. v. Cotton, 12 Colo. App. 375. And see other cases cited ante, §§ 84, 85, notes 206 et seq.

A finding that persons dealt with an association as a corporation is sustained, in the absence of evidence to the contrary, by evidence that they dealt with it as the "M. Savings Bank," where there is a statute forbidding any unincorporated bank to solicit deposits as a "savings bank." Richards v. Minnesota Sav. Bank, 75 Minn. 196.

In Guckert v. Hacke, 159 Pa. St. 303, it was held that the mere fact that a person who had contracted with an association which had attempted but failed to incorporate, the contract having been made

(d) **Making note payable at a bank.**—It has been held that the rule that one who has contracted with an association as a corporation by its corporate name is estopped to deny its corporate existence does not apply where a note drawn payable at the "Hungerford National Bank" becomes the property of such bank, and is sued upon by it, since merely mentioning a bank in a note as the place of payment is not such a recognition of the bank as a corporation as to estop the maker to deny its corporate existence.[322]

(e) **What constitutes holding out as a corporation.**—What has just been said with regard to recognition applies also when it is sought to base an estoppel upon the holding out of an association as a corporation. In order that members or agents of an association may be estopped to deny that it is a corporation on the ground that they have held it out as a corporation, the acts relied upon must be equivalent to a representation or admission of corporate existence, and therefore will not operate as an estoppel, if they are just as consistent with the existence of an unincorporated association as with the existence of a corporation. As was said by the Alabama court: "To warrant holding a person estopped from disputing the existence of a corporation, on the ground that he has co-operated in its organization and action, the acts shown must be unmistakably corporate acts.[323] If the act done, or admission made, is just as consistent with the existence of an unincorporated association, as of one incorporated, its ambiguous character will be so equivocal as not to raise an estoppel."[324]

without knowledge of any claim of corporate existence, accepted a note in its corporate name after he had performed the contract, did not estop him to sue the associates individually on the contract, as his rights were fixed by the status of the parties at the time the contract was made.

[322] Hungerford Nat. Bank v. Van Nostrand, 106 Mass. 559.

In a Kentucky case, however, it was held that one who had accepted, as payee, a note made payable at a bank which was styled by the parties to the note a "national bank," and who sold the note to the bank, could not put the organization of the bank as a corporation in issue by merely averring want of knowledge or information sufficient to form a belief as to its corporate existence. Huffaker v. National Bank of Monticello, 12 Bush (Ky.) 287.

[323] Quoting 2 Herman, Estoppel, § 1247.

[324] Schloss v. Montgomery Trade

Thus, it has been held in a Michigan case that acceptance of the office of treasurer of a religious association does not estop one from denying that the association is a corporation, since an unincorporated association may have a treasurer; and that a claim of corporate existence upon the part of a church is not shown by proof that the members held the ordinary meetings of a religious society, and elected officers, for these acts are as consistent with the existence of an unincorporated church as of a corporation. "Estoppels," said the court in this case, "never arise from ambiguous facts; they must be established by those which are unequivocal, and not susceptible to two constructions."[325]

And in an Iowa case it was held that a body sued as a corporation was not estopped to deny its existence as a corporation merely by reason of the fact that the associates had passed by-laws, held business meetings, acquired property, received and paid out money, appointed agents, and made contracts, as these acts might be done as well by an unincorporated association as by a corporation.[326] An attempt to incorporate is not an exercise of assumed corporate powers, so as to create an estoppel to deny corporate existence.[327]

V. Quo Warranto Proceedings by the State.

§ 93. In general.—By statute in most jurisdictions, or at common law, in the absence of statutory provision, a direct proceeding by information in the nature of quo warranto by the state, or by the attorney general on behalf of the state, will lie against persons who assume to exercise corporate powers without being legally incorporated, to oust them from the exercise of such powers, unless the state has waived the right to institute such a proceeding. To defeat such a proceeding, the defendants must show a de jure corporate existence.

If persons associate and assume to act as a corporate body

Co., 87 Ala. 411, 13 Am. St. Rep. 51. And see Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476; Bash v. Culver Gold Min. Co., 7 Wash. 122.

[325] Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476.

[326] Kirkpatrick v. United Presbyterian Church of Keota, 63 Iowa, 372.

[327] Kirkpatrick v. United Presbyterian Church of Keota, 63 Iowa, 372.

without any statute authorizing them to incorporate, or under an unconstitutional statute, or under a constitutional statute without having substantially complied with all conditions precedent prescribed by the statute, an information in the nature of *quo warranto* will lie by the state, or by the attorney general on behalf of the state, to oust them from the exercise of corporate powers. In most jurisdictions, such a proceeding is expressly authorized by statute. In the absence of statutory provision therefor, it may be maintained at common law.[328]

Where an association of persons, in conducting the business of insurance, profess, without being legally incorporated, to limit their liability to the amount of money contributed by each, and assume to give perpetuity to the business by making membership certificates transferable by the assignment thereof by the members or their personal representatives, they are "acting as a corporation," within the meaning of a statute authorizing *quo warranto* proceedings.[329]

[328] Greene v. People, 150 Ill. 513; State v. Ackerman, 51 Ohio St. 163; State v. Webb, 97 Ala. 111, 38 Am. St. Rep. 151; People v. Stanford, 77 Cal. 360; People v. Ottawa Hydraulic Co., 115 Ill. 281; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200; Hord v. Elliott, 33 Ind. 220; State v. Dillon, 36 Ind. 388; State v. Beck, 81 Ind. 500; Holman v. State, 105 Ind. 569; Smith v. State, 140 Ind. 343; State v. Brown, 33 Miss. 500, 34 Miss. 688; Territory v. Virginia Road Co., 2 Mont. 96; National Docks Ry. Co. v. Central R. Co., 32 N. J. Eq. 755; People v. Boston, Hoosac Tunnel & W. Ry. Co., 27 Hun (N. Y.) 528; People v. De Grauw, 133 N. Y. 254, reversing 62 Hun, 224; State v. Sherman, 22 Ohio St. 411; State v. Central Ohio Mutual Relief Ass'n, 29 Ohio St. 399.

The attorney general need not obtain leave of court before instituting such proceedings, unless it is expressly required by statute. People v. Boston, Hoosac Tunnel & W. Ry. Co., 27 Hun (N. Y.) 528.

As to the sufficiency of an information or complaint in quo warranto, see People v. Ottawa Hydraulic Co., 115 Ill. 281; Hord v. Elliott, 33 Ind. 220; State v. Kingan, 51 Ind. 142; State v. Beck, 81 Ind. 500; Smith v. State, 140 Ind. 343; Territory v. Virginia Road Co., 2 Mont. 96.

As to the sufficiency and effect of the answer or plea in such proceedings, see People v. Lowden (Cal.) 8 Pac. 66; State v. Brown, 33 Miss. 500, 34 Miss. 688; People v. Thompson, 16 Wend. (N. Y.) 655; State v. Sherman, 22 Ohio St. 411.

In quo warranto proceedings to oust the defendant from the exercise of corporate powers, on the ground that they are not legally incorporated, the burden is on the defendants to show legal incorporation, and their answer should set forth facts showing the same. People v. Lowden (Cal.) 8 Pac. 66.

As to effect of a judgment of ouster upon prior acts and contracts, see ante, § 81(1).

[329] Greene v. People, 150 Ill. 513.

§ 94. Against whom.

Unless it is otherwise provided by statute, an information to oust persons from the exercise of corporate powers, on the ground that they are not legally incorporated, must be brought against the associates as individuals, and not against them as a corporation, for when the association is brought into court by its corporate name, its existence as a corporation is admitted.[330]

§ 95. Proof of corporate existence.

To defeat *quo warranto* proceedings by the state, it is not enough to show a *de facto* corporate existence. It is only where the corporate existence of an association is collaterally attacked that this is sufficient.[331] As against a direct attack by the state, a *de jure* corporate existence must be shown, and to show this, it is necessary to show both a valid law authorizing such a corporation as the one in question, and a substantial compliance, in the organization of the corporation, with all conditions precedent prescribed by the statute.[332]

In such proceedings, the burden is on the defendants to show legal incorporation, and not upon the state to show want of incorporation.[333]

As we have seen in another section, failure to comply with conditions subsequent prescribed in the statute creating or authorizing the formation of a corporation does not prevent the corporation from coming into existence as such.[334] It may be ground, however, for proceedings by the state to deprive it of its charter, or, if the statute so provides, it may operate, *ipso*

[330] Mud Creek Draining Co. v. State, 43 Ind. 236; State v. Hannibal & R. C. Gravel Road Co., 37 Mo. App. 496; Chesshire v. People, 116 Ill. 493.

[331] Ante, § 81 et seq.

[332] State v. Webb, 97 Ala. 111, 38 Am. St. Rep. 151; People v. Chambers, 42 Cal. 201; People v. Selfridge, 52 Cal. 331, 1 Keener's Cas. 90; People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 1 Smith's Cas. 74; People v. Stockton & Visalia R. Co., 45 Cal. 306, 13 Am. Rep. 178; Attorney General v. Hanchett, 42 Mich. 436; Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287; State v. Central Ohio Mutual Relief Ass'n, 29 Ohio St. 399; People v. Cheeseman, 7 Colo. 376; State v. Critchett, 37 Minn. 13; State v. Bethlehem & Z. Gravel Road Co., 32 Ind. 357; Holman v. State, 105 Ind. 569.

[333] People v. Lowden (Cal.) 8 Pac. 66; and cases cited in the note preceding.

[334] Ante, § 73.

facto, as a dissolution of the corporation. This question will be treated at length in a subsequent chapter.[335]

We have also seen that failure to comply with provisions of the statute which are merely directory does not render incorporation invalid, even as against a direct attack by the state.[336] And we have seen that failure to comply *literally* with the statutory requirements in the organization of a corporation will not necessarily render the attempted incorporation invalid. All that is necessary, even as against the state, is that the provisions of the state shall be *substantially* complied with.[337] Nor is the validity of an attempted incorporation affected by mere surplusage in the application, articles of association, or certificate of incorporation.[338]

§ 96. Waiver and estoppel.

As has been explained in a former section, the state may waive its right to institute *quo warranto* proceedings against a corporation for failure to comply with the requirements of the law in its organization; and it may do so, either by expressly curing defects or irregularities, or impliedly by recognizing the corporation as having a legal existence. After such a waiver or cure of defects, it will be estopped to institute proceedings against the corporation because of such defects or irregularities.[339]

The fact that the state, in an indictment for an offense against property, has described such property as the property of a corporation, does not estop it from subsequently maintaining *quo warranto* proceedings to contest the validity of the organization of the corporation.[340]

[335] Post, §§ 306, 314(d).

[336] Ante, § 74.

[337] People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 1 Smith's Cas. 74; People v. Stockton & Visalia R. Co., 45 Cal. 306, 13 Am. Rep. 178; State v. Wood, 13 Mo. App. 139; People v. Cheeseman, 7 Colo. 376.

[338] Ante, § 76.

[339] McCulloch v. State, 11 Ind. 242 (where subscriptions to the capital stock of a corporation were received through agents under the superintendence of the state); Boykin v. State, 96 Ala. 16; State v. Webb, 110 Ala. 214; People v. Perrin, 56 Cal. 345; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; People v. Farnham, 35 Ill. 562; Attorney General v. Joy, 55 Mich. 94. See, also, ante, § 77.

[340] State v. Beck, 81 Ind. 500.

In People v. Lowden (Cal.) 8 Pac. 66, it was held that the fact that the person on whose relation

§ 97. Delaying and instituting proceedings.

Where an association has failed to comply with the law in attempting to organize as a corporation, mere delay on the part of the state in instituting proceedings to oust the associates from the exercise of corporate powers will not bar such proceedings, if there has been no waiver by the state of the failure to comply with the statutes, unless there is some statute expressly limiting the time for instituting such proceedings.[341] When there is such a statute, and *quo warranto* proceedings are instituted, it is sufficient if the last of the acts relied upon as showing usurpation of corporate powers has taken place within the time limited, for the usurpation of corporate powers is a continuing cause of action.[342]

VI. Equity Jurisdiction

§ 98. In general.—A court of equity has jurisdiction to protect private rights against violation by persons assuming to act as a corporation without authority, or to enjoin a public nuisance at the suit of the state; but it has no jurisdiction, unless it is conferred by statute, to enjoin the exercise of corporate powers merely because of want of legal incorporation.

The remedy against an association of persons for the usurpation of corporate powers without being legally incorporated is by *quo warranto,* as explained in the preceding section. A court of equity has no jurisdiction to enjoin them merely because of their want of incorporation, either at the suit of a private individual, or at the suit of the state, or of the attorney general on behalf of the state, unless such jurisdiction is conferred by statute.[343]

a proceeding in quo warranto for usurpation of a corporate franchise was instituted acted at one time as an officer of the alleged corporation, and by his representations as to the validity of the franchise induced the defendants to purchase the same, could not estop the maintenance of the action by the attorney general.

[341] State v. Webb, 97 Ala. 111, 38 Am. St. Rep. 151. But see State v. Miami Exporting Co., 11 Ohio, 126.

[342] People v. Rensselaer Ins. Co., 38 Barb. (N. Y.) 323. See, also, People v. Stanford, 77 Cal. 360.

[343] National Docks Ry. Co. v. Central R. Co., 32 N. J. Eq. 755; Renwick v. Hall, 84 Ill. 162; Independent Order of Foresters v. United Order of Foresters, 94 Wis.

A court of equity, however, where a corporate existence is fraudulently or unlawfully assumed in order to acquire a franchise, has jurisdiction to protect the rights of persons or other corporations violated by the exercise of the powers so usurped.[344]

And, as we shall see in another chapter, a court of equity has jurisdiction, at the suit of the state, or of the attorney general in behalf of the state, to enjoin an unlawful assumption of corporate powers, by which a public nuisance is created or threatened.[345]

234; Clarke v. Brooklyn Bank, 1 Edw. Ch. (N. Y.) 361; Morrow v. Edwards, 20 D. C. 475. Compare Attorney General v. Chicago & Northwestern Ry. Co., 35 Wis. 425. And see post, §§ 208, 319.

Where, as in Illinois, a statute provides that an information in the nature of quo warranto will lie where any association or number of persons shall act as a corporation without being legally incorporated, a court of equity has no jurisdiction to determine whether an association is legally incorporated. Renwick v. Hall, 84 Ill. 162.

[344] Elizabethtown Gas Light Co. v. Green, 49 N. J. Eq. 329; Putnam v. Sweet, 1 Chard (Wis.) 286, 2 Pin. 302.

[345] See post, § 208 et seq.

CHAPTER V.

PROMOTION OF CORPORATIONS; ACTS PRIOR TO INCORPORATION; INCORPORATION OF PARTNERSHIPS, ETC.

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113. Incorporation of tenants in common.

§ 99. General summary.—An association cannot exercise any corporate franchise or power as a corporation until it has become incorporated to such an extent, at least, as to acquire a de facto corporate existence, nor, until then, can it have an agent.

A corporation is neither liable upon, nor entitled to enforce, contracts made on its behalf by its promoters before incorporation, unless it is otherwise provided by its charter or by statute, or unless it expressly or impliedly adopts or ratifies the same; but, by the weight of authority, it may expressly or impliedly adopt or ratify such contracts, and thus make them its own, after incorporation, provided they are within the powers conferred upon it by its charter.

By the weight of authority, a corporation is not liable for the services or expenses of its promoters, unless made so by its charter or by statute; but it is bound by an express promise to pay the same after incorporation.

Knowledge of the promoters of a corporation is not imputable to the corporation.

Admissions and declarations of the promoters of a corporation are not evidence against the corporation.

A demand upon the promoters of a corporation is not a demand upon the corporation.

The promoters of a corporation are personally liable upon contracts made by them before incorporation, although made on behalf of the corporation, in the absence of an understanding to the contrary, unless they are released from liability. The mere adoption of the contract by the corporation does not release them.

The promoters of a corporation occupy a fiduciary relation towards the corporation when formed, and towards the persons who subscribe for stock therein; and the general rule is, that they cannot take advantage of their position to make a secret profit in

their transactions on behalf of the corporation, or in their dealings with the corporation when formed.

Promoters of a proposed corporation, if they fail to organize the corporation, are liable to subscribers for money received from them, unless there is an understanding to the contrary.

No title to property can vest in an association as a corporation before it has become incorporated. But—

(1) A deed may be executed to a corporation before its creation, and delivered and accepted afterwards.

(2) A deed may be executed and delivered in escrow, to be delivered to a corporation after its creation.

(3) Title to personal property vests in a corporation if delivered to a person for it before its incorporation, and accepted by it afterwards.

(4) A deed to a corporation before its incorporation inures to its use after incorporation by way of estoppel against the grantor.

(5) A deed may be made in trust to convey to a corporation when created, and the corporation, when created, may compel the trustee to convey.

(6) The vendor of land to persons for a corporation to be formed may be held as trustee, and compelled to convey to the corporation when formed.

(7) Franchises granted to a corporation to be formed vest in corporation when it is formed, but the grant may be revoked before the corporation is formed.

(8) A grant or conveyance of land may be made to a corporation for a charitable or public use before its formation, and the grant or conveyance will remain in abeyance until it is formed, and then vest.

Where persons who own property and have been doing business as a partnership or other unincorporated association are incorporated, the corporation is distinct in the law from the former partnership or association, and, unless it is otherwise provided in the charter, the property and contract rights or liabilities of the partnership or association do not become the property, rights, or liabilities of the corporation, in the absence of a conveyance or assignment to, or assumption by, the corporation, as the case may be.

Incorporation of persons owning property as tenants in common does not vest the title to the property in the corporation, unless the charter so provides.

§ 100. Exercise of powers and franchises before incorporation.

De facto corporation.—As a general rule, as we have seen at length in a former chapter, as soon as an association, in organizing as a corporation, has so far complied with the statute as to become a corporation *de facto,* it has the capacity to enter into contracts, to execute and take conveyances, and to exercise other corporate powers and franchises, to substantially the same extent as if it were a corporation *de jure,* for a corporation *de facto* is in substantially the same position as a corporation *de jure,* except as against a direct proceeding by the state to oust it from the exercise of corporate powers.[1] We have also seen that, according to the weight of authority, there is a corporation *de facto* when, and only when, there is a valid law creating or authorizing the corporation, a *bona fide* attempt to organize under the law, a colorable compliance with the requirements of the law, and the assumption or user of corporate powers.[2]

Estoppel to deny corporate existence.—We have also seen that, by the weight of authority, a person who enters into a contract with an association as a corporation, or who executes a conveyance to or takes a conveyance from an association as a corporation, although it may not have even a *de facto* corporate existence, may by his dealing with it be estopped to deny its corporate existence;[3] and that members of an association, individually and collectively, and persons acting as officers, who participate in holding out the association as a corporation, may be estopped to deny its corporate existence for the purpose of avoiding the effect of contracts or acts made or done by the association as a corporation.[4]

[1] Ante, §§ 80, 81.
[2] Ante, § 82.
[3] Ante, § 84.
[4] Ante, § 87.

If persons have been acting as a corporation de facto, and have contracted debts as such, they do not cease to be liable for such debts as a corporation by becoming a corporation de jure, and property held by them in the latter character may be levied upon and sold to satisfy the debts contracted by them in the former character. Georgia Ice Co. v. Porter, 70 Ga. 637.

Where an association had carried on business as a corporation, and held itself out to the world as such before it was organized according to law, it was held that the assets should be made liable for debts contracted before its organ-

When there is neither a de facto corporate existence nor an estoppel.—If, however, persons contemplating or attempting to form a corporation have not proceeded far enough to acquire even a *de facto* corporate existence, and if there is no element of estoppel, as hereinbefore explained, they cannot, either acting themselves or by agents appointed by them, exercise any corporate power or franchise. They cannot act as a corporate body until they have become incorporated, at least *de facto*. Nor can their contracts or acts, or the contracts or acts of agents appointed by them, be regarded as the contracts or acts of the corporation when it is afterwards completely formed, although made or done on its behalf and in its name, unless it is so provided by the charter of the corporation or some other statute, for, in the nature of things, a person cannot be the agent of a corporation until the corporation is in existence. Agency necessarily implies the existence of a principal, and a delegation of authority by the principal.

Until a corporation is organized as authorized by its charter, said the Illinois supreme court, "there is not a corporation, nor does it possess franchises or faculties for it or others to exercise, until it acquires a complete existence. By its birth, so to speak, it for the first time acquires its faculties to transact its business and perform its functions."[5]

Nonperformance of conditions subsequent.—As was shown in a former chapter, the existence of a corporation is not affected by its failure to perform conditions subsequent.[6] As soon as an association has accepted a special act of incorporation, creating it a corporation *in praesenti*,—and an acceptance of such an act, as we have seen, may be presumed,[7]—or as soon as conditions

ization, and that judgments on such debts recovered before organization were superior to mortgages given by the corporation after organization. Bergen v. Porpoise Fishing Co., 41 N. J. Eq. 238.

[5] Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652; McVicker v. Cone, 21 Or. 353; Ireland v. Globe Milling & Reduction Co., 20 R. I. 190; Utah Optical Co. v. Keith (Utah) 56 Pac. 155. See, also, post, §§ 101, 111, and many cases there referred to.

[6] Ante, § 73, and cases cited in the notes following.

[7] Ante, §§ 44(f), 66.

precedent have been complied with in organizing under either a general or special law, and corporate existence has been thus acquired under the law, corporate faculties and powers attach to it, although it may not have commenced active business operations, and although conditions subsequent may not yet have been performed. Until the performance of the conditions subsequent it may have no *right* to commence business, but it is nevertheless a corporation, and has corporate powers and faculties.[8]

For example, where letters patent were issued to a corporation by the governor under a Pennsylvania statute, and a conveyance was afterwards made to it, the court held that the conveyance was valid and vested the title in the corporation, since acceptance of the charter would be presumed, and that it was no objection that the corporation had not been organized by the election of officers, as this was not necessary to its existence as a corporation.[9] The same is true of contracts made by the corporators on behalf of the corporation after it has acquired a corporate existence, but before it has elected officers or commenced active business operations.[10]

And where a corporation is in existence and has obtained a franchise, and is prepared to sell shares of its stock and to erect buildings for the purpose of carrying on its business, it may sue for redress against one who sets up a void title to a similar and

[8] Ante, § 73.

[9] Rathbone v. Tioga Nav. Co., 2 Watts & S. (Pa.) 74.

[10] Harrison v. Vermont Manganese Co., 1 Misc. Rep. (N. Y.) 402; Legrand v. Manhattan Mercantile Ass'n, 80 N. Y. 638. See Paxton Cattle Co. v. First Nat. Bank of Arapahoe, 21 Neb. 621, 59 Am. Rep. 852; Badger Paper Co. v. Rose, 95 Wis. 145.

In Lagrand v. Manhattan Mercantile Ass'n, 80 N. Y. 638, the defendant had been incorporated by special charter, and authorized to commence business when a certain portion of its capital stock was paid in, though it could perform corporate acts before that time. Prior to December, 1874, directors and other officers had been elected, and the corporation had opened an office, preparatory to the active commencement of business. The plaintiff was hired at that date by the defendant's vice president, who was its manager, to be paid at a certain rate per annum, the other officers assenting. The services rendered were in the office, and continued to June, 1875, being the proper and necessary work preliminary to active business operations. It was held that there was a valid contract on the part of the corporation.

exclusive franchise, although it is not yet ready to enter upon the full transaction of its business.[11] If a corporation has acquired existence by virtue of an act of incorporation, and has not forfeited its privileges by delay in organizing, it may have relief by injunction against wrongs done and threatened between the act of incorporation and the issuance of letters patent.[12]

§ 101. Liability of corporation under contracts made by promoters.

(a) In general.—Since a corporation has no existence, and cannot have an agent, until it has been created or organized, to such an extent, at least, as to become a corporation *de facto,* it necessarily follows that until then it cannot engage in business or enter into a contract. Its promoters are not its agents, and cannot contract for it. A corporation, therefore, when it has been organized, and has thus acquired corporate existence, is not liable upon a contract made by its promoters, or by agents appointed by them, before its organization, even though the contract may have been made in its name and with the understanding that it would perform the same,[13] unless it has expressly or im-

[11] Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138.

[12] Packer v. Sunbury & Erie R. Co., 19 Pa. St. 211.

[13] England: Payne v. New South Wales Coal & I. S. Nav. Co., 10 Exch. 283; Gunn v. London & Lancashire Fire Ins. Co., 12 C. B. (N. S.) 695; Caledonian & Dumbartonshire Junction Ry. Co. v. Magistrates of Helensburgh, 2 Macq. H. L. Cas. 391; In re Skegness & St. Leonard's Tramways Co., 41 Ch. Div. 215.

United States: Winters v. Hub Min. Co., 57 Fed. 287; Summerlin v. Fronteriza Silver Mining & Milling Co., 41 Fed. 249.

Alabama: Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206, 13 Am. St. Rep. 23.

Arkansas: Little Rock & Ft. Smith R. Co. v. Perry, 37 Ark. 164, 44 Ark. 383.

California: Morrison v. Gold Mountain Gold Min. Co., 52 Cal. 306; Hawkins v. Mansfield Gold Min. Co., 52 Cal. 513; Blood v. La Serena Land & Water Co., 113 Cal. 221; Scadden Flat Gold-Mining Co. v. Scadden, 121 Cal. 33.

Colorado: Hersey v. Tully, 8 Colo. App. 110.

Connecticut: New York & New Haven R. Co. v. Ketchum, 27 Conn. 170.

Illinois: Western Screw & Mfg. Co. v. Cousley, 72 Ill. 531, 2 Keener's Cas. 1918; Safety Deposit Life Ins. Co. v. Smith, 65 Ill. 309; Rockford, Rock Island & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652; Sellers v. Greer, 172 Ill. 549; Park v. Modern Woodmen of America, 181 Ill. 214.

Indiana: Smith v. Parker, 148 Ind. 127; Davis & Rankin Bldg.

pliedly ratified or adopted the same since its organization,[14] or unless liability is imposed upon it by its charter or by some other statute.[15] It can make no difference in the application of this principal that the promoters who made the contract are the only stockholders or members of the corporation, for a corporation, as we have seen, is a legal entity and artificial person distinct from its stockholders or members as individuals.[16]

"That a corporation," said the supreme court of Illinois,

& Mfg. Co. v. Hillsboro Creamery Co., 10 Ind. App. 42.

Iowa: Carey v. Des Moines Co-Op. Coal & Min. Co., 81 Iowa, 674; Stevenson v. Dubuque Level & Lead Min. Co., 34 Iowa, 577.

Louisiana: Marchand v. Loan & Pledge Ass'n, 26 La. Ann. 389.

Maine: Blue Hill Academy v. Witham, 13 Me. 403.

Maryland: Franklin Fire Ins. Co. v. Hart, 31 Md. 59.

Massachusetts: Frost v. Inhabitants of Belmont, 6 Allen (Mass.) 152; Penn Match Co. v. Hapgood, 141 Mass. 145; Abbott v. Hapgood, 150 Mass. 248, 15 Am. St. Rep. 193.

Michigan: Carmody v. Powers, 60 Mich. 26.

Minnesota: Battelle v. Northwestern C. & C. Pavement Co., 37 Minn. 89; Church v. Church Cementico Co., 75 Minn. 85.

Missouri: Hill v. Gould, 129 Mo. 106; Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356; Joy v. Manion, 28 Mo. App. 55; Pitts v. D. M. Steele Mercantile Co., 75 Mo. App. 221.

Nebraska: Clarke v. Omaha & Southwestern R. Co., 5 Neb. 314; Davis v. Ravenna Creamery Co., 48 Neb. 471; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834.

Nevada: Paxton v. Beacon Mill & Min. Co., 2 Nev. 257.

New Jersey: See Vandyke v. Brown, 8 N. J. Eq. 657.

New York: Munson v. Syracuse, Geneva & C. R. Co., 103 N. Y. 58; Oakes v. Cattaraugus Water Co., 66 Hun (N. Y.) 634, 143 N. Y. 430; Lorillard v. Clyde, 122 N. Y. 498; Central Park Fire Ins. Co. v. Callaghan, 41 Barb. (N. Y.) 448; Schmidt v. Nelke Art Lithograph Co., 16 Misc. Rep. (N. Y.) 300; Wilbur v. New York Electric Construction Co., 58 N. Y. Super. Ct. 539; Hecla Consolidated Gold Min. Co. v. O'Neill, 19 N. Y. Supp. 592; Dillon v. Commercial Cable Co., 87 Hun (N. Y.) 444; Berridge v. Abernethy, 24 Wkly. Dig. (N. Y.) 513.

Pennsylvania: Bell's Gap R. Co. v. Christy, 79 Pa. St. 54, 2 Keener's Cas. 1921; Tift v. Quaker City Nat. Bank, 8 Pa. Co. Ct. Rep. 606, 141 Pa. St. 550.

Rhode Island: Ireland v. Globe Milling & Reduction Co., 20 R. I. 190.

Tennessee: Pittsburgh & Tennessee Copper Min. Co. v. Quintrell, 91 Tenn. 693.

Texas: Weatherford, Mineral Wells & N. W. Ry. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837.

Utah: Long v. Citizens' Bank, 8 Utah, 104.

Washington: Bash v. Culver Gold Min. Co., 7 Wash. 122.

Wisconsin: Buffington v. Bardon, 80 Wis. 635.

A contract by promoters of a beneficial association, before incorporation, to locate the chief office of the association in a certain city in consideration of the citizens thereof paying office expenses, head physician's salary, and other expenses, for one year, is not binding on the association after incorporation unless adopted or ratified. Park v. Modern Woodmen of America, 181 Ill. 214.

[14] Post, § 101(c).

[15] Post, § 101(b).

[16] Battelle v. Northwestern C. & C. Pavement Co., 37 Minn. 89.

"should have a full and complete organization and existence as an entity before it can enter into any kind of a contract or transact any business, would seem to be self evident. This is unconditionally true, unless the act of incorporation authorizes the corporators to perform acts and enter into contracts to bind the company when it shall be organized. As well say a child *in ventre sa mere* may enter into a contract, or that its parents may bind it by contract. A corporation, until organized, has no being, franchises or faculties. Nor do those engaged in bringing it into being have any power to bind it by contract, unless so authorized by the charter. Until organized as authorized by the charter there is not a corporation, nor does it possess franchises or faculties for it or others to exercise, until it acquires a complete existence. By its birth, so to speak, it for the first time acquires its faculties to transact its business and perform its functions."[17]

——**Illustrations.**—For example, when persons contemplate or attempt the formation of an insurance company under a general law, they must organize under the law to such an extent as to acquire at least a *de facto* corporate existence, before they can transact business and issue policies of insurance as a corporation. Policies issued by them before they have organized, although in the name of the prospective corporation, will not be the contracts of the corporation when it afterwards comes into existence, unless it then assumes or adopts them.[18] And an incorporated bank is not liable upon a certificate of deposit issued before its incorporation, although it was signed, as cashier, by a person who has become its cashier since its organization, where it does not appear that it has received the consideration or otherwise assumed the obligation.[19]

On the same principle, a corporation is not liable, in the absence of ratification or adoption, or of a charter or statutory provision imposing liability, for the salary of a superintendent or other person for services performed for it before its organiza-

[17] Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652.

[18] Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652.

[19] Long v. Citizens' Bank, 8 Utah, 104.

tion under a contract made by its promoters, although the contract may have been made on its behalf and with the understanding that it should be bound, and although the promoters who made it may have become its stockholders and officers.[20] Nor is it bound by an agreement by its promoters that a person shall be appointed an officer of the corporation at a certain salary, or otherwise employed by it, when it shall be organized.[21]

A promoter of a corporation cannot bind it by a contract made with a subscriber to its stock before organization, in order to induce the subscription.[22] Nor is a corporation bound by contracts of promoters as to the right to stock.[23]

(b) Liability imposed by charter or by statute.—The act by or under which a corporation is created may allow the promoters to make certain contracts on its behalf before it is organized, and may expressly or impliedly make it liable thereon. In such a case an action may be maintained against the corporation on the contract, if the charter or statutory provisions have been complied with,[24] although not otherwise;[25] for in accepting a charter, or organizing under a statute, a corporation accepts all its provisions and becomes subject to all the burdens imposed thereby.[26]

(c) Adoption or ratification of contract by corporation—(1) In general.—In England it has been held in the more recent cases that, in the absence of a charter or statutory provision, a contract made by the promoters of a corporation on its behalf before incorporation is a nullity, and that the corporation cannot

[20] Western Screw & Mfg. Co. v. Cousley, 72 Ill. 531, 2 Keener's Cas. 1918; Little Rock & Ft. Smith R. Co. v. Perry, 37 Ark. 164, 44 Ark. 383; Carey v. Des Moines Co-Op. Coal & Min. Co., 81 Iowa, 674; Weatherford, Mineral Wells & N. W. Ry. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837.

[21] Stevenson v. Dubuque Level & Lead Min. Co., 34 Iowa, 577; Oakes v. Cattaraugus Water Co., 66 Hun (N. Y.) 634, 143 N. Y. 430.

[22] Joy v. Manion, 28 Mo. App. 55.

[23] Morrison v. Gold Mountain Gold Min. Co., 52 Cal. 306; Hawkins v. Mansfield Gold Min. Co., 52 Cal. 513; Dillon v. Commercial Cable Co., 87 Hun (N. Y.) 444; Carey v. Des Moines Co-Op. Coal & Min. Co., 81 Iowa, 674.

[24] Tilson v. Warwick Gaslight Co., 4 Barn. & C. 962; In re Brampton & Longtown Ry. Co., 10 Ch. App. 177; Gent v. Manufacturers' Mut. Ins. Co., 107 Ill. 652.

[25] Hutchison v. Surrey Consumers' Gas-Light & Coke Ass'n, 11 C. B. 689; Gunn v. London & Lancashire Fire Ins. Co., 12 C. B. (N. S.) 694.

[26] Ante, § 44(c).

ratify or adopt it, and thus make it binding upon it, after incorporation,[27] although an action *quasi ex contractu* may be maintained against it, if it accepts the benefit of such a contract.[28] This view has also been taken by the supreme court of Massachusetts.[29]

In other states, however, the English doctrine has been repudiated, and it has been held that a contract made by the promoters of a corporation on its behalf may be ratified or adopted by the corporation when organized, and that the corporation is then liable, both at law and in equity, *on the contract itself*, and not merely for the benefits received.[30] It was said in a late

[27] Keiner v. Baxter, L. R. 2 C. P. 174; Melhado v. Porto Alegre, New Hambourgh & B. Ry. Co., L. R. 9 C. P. 503; In re Empress Engineering Co., 16 Ch. Div. 125; In re Northumberland Ave. Hotel Co., 33 Ch. Div. 16.

In Spiller v. Paris Skating Rink Co., 7 Ch. Div. 368, 2 Keener's Cas. 1924, ratification of such a contract by the corporation was held valid and binding upon it in equity; but this case is overruled by In re Empress Engineering Co., 16 Ch. Div. 125, and In re Northumberland Ave. Hotel Co., 33 Ch. Div. 16. Compare Touche v. Metropolitan Railway Warehousing Co., 6 Ch. App. 671.

The adoption and confirmation by directors of a contract made before the formation of a company by persons purporting to act on behalf of the company and others does not create any contractual relation between the company and the other parties to the contract, or impose any obligation on the company towards such parties. North Sydney Investment & Tramway Co. v. Higgins. [1899] App. Cas. 263. And see In re Johannesburg Hotel Co. [1891] 1 Ch. 119.

[28] In re Empress Engineering Co., 16 Ch. Div. 125; In re Northumberland Ave. Hotel Co., 33 Ch. Div. 16; In re Dale, 61 Law T. (N. S.) 206.

[29] Abbott v. Hapgood, 150 Mass. 248, 15 Am. St. Rep. 193. Compare the dictum in Penn Match Co. v. Hapgood, 141 Mass. 145. See, also, Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356.

[30] United States: Whitney v. Wyman, 101 U. S. 392; Bridgeport Electric & Ice Co. v. Meader, 72 Fed. 115.

Alabama: Davis v. Montgomery Furnace & Chemical Co., 8 So. 496.

Arkansas: Little Rock & Ft. Smith R. Co. v. Perry, 37 Ark. 164, 44 Ark. 383.

California: Chater v. San Francisco Sugar Refining Co., 19 Cal. 220. And see Scadden Flat Gold Min. Co. v. Scadden, 121 Cal. 33.

Colorado: Colorado Land & Water Co. v. Adams, 5 Colo. App. 190; Arapahoe Inv. Co. v. Platt, 5 Colo. App. 515.

Connecticut: Stanton v. New York & Eastern Ry. Co., 59 Conn. 272, 21 Am. St. Rep. 110; Waterman's Appeal, 26 Conn. 96.

Georgia: Chicago Building & Mfg. Co. v. Talbotton Creamery & Mfg. Co., 106 Ga. 84

Illinois: Western Screw & Mfg. Co. v. Cousley, 72 Ill 531, 2 Keener's Cas. 1918; Wood v. Whelen, 93 Ill. 153; Reichwald v. Commercial Hotel Co., 106 Ill. 439.

Indiana: Bruner v. Brown, 139 Ind. 600.

Iowa: Dubuque Female College v. Dubuque District Tp., 13 Iowa,

Connecticut case: "A corporation has power when fully organized to ratify a contract made by the promoters when it is one within the purposes for which the corporation was organized and appears to be a reasonable means for the carrying out of other purposes."[31] And, of course, when a contract is ratified or adopted it is adopted *in toto,* and the corporation is bound by all its terms and subject to all its burdens, to the same extent as if it had itself made the contract in the first instance.[32]

555; Louis Cook Mfg. Co. v. Randall, 62 Iowa, 244.

Kansas: Davis v. Dexter Butter & Cheese Co., 52 Kan. 693.

Kentucky: Frankfort & S. Turnpike Co. v. Churchill, 6 T. B. Mon. 427, 17 Am. Dec. 159.

Maryland: Franklin Fire Ins. Co. v. Hart, 31 Md. 59; Grape Sugar & Vinegar Mfg. Co. v. Small, 40 Md. 395.

Minnesota: Battelle v. Northwestern C. & C. Pavement Co., 37 Minn. 89; McArthur v. Times Printing Co., 48 Minn. 319, 31 Am. St. Rep. 653, 2 Keener's Cas. 1926.

Mississippi: Johnston v. Gumbel, 19 So. 100.

Missouri: Pitts v. D. M. Steele Mercantile Co., 75 Mo. App. 221.

Nebraska: Paxton Cattle Co. v. First Nat. Bank of Arapahoe, 21 Neb. 621, 59 Am. Rep. 852.

Nevada: Paxton v. Bacon Mill & Min. Co., 2 Nev. 257.

New York: Bommer v. American Spiral Spring Butt Hinge Mfg. Co., 81 N. Y. 468; Rogers v. New York & J. Land Co., 134 N. Y. 197; Oakes v. Cattaraugus Water Co., 143 N. Y. 430; Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. 333; Burden v. Burden, 8 App. Div. 160, 159 N. Y. 287; Grier v. Hazard, Hazard & Co., 13 N. Y. Supp. 583; Van Shaick v. Third Ave. R. Co., 49 Barb. 409; Bell v. Shibley, 33 Barb. 610; Hall v. Herter Bros., 90 Hun, 280, 157 N. Y. 694. See, also, Wilson v. Kings County Elevated R. Co., 114 N. Y. 487; Burke v. Lincoln Valentine Co., 28 Misc. Rep. 202; Davis v. Valley Electric Light Co., 61 N. Y. Supp. 580;

Ohio: City Bldg. Ass'n, No. 2, v. Zahner, 6 Ohio Dec. 1068.

Oregon: Schreyer v. Turner Flouring Mills Co., 29 Or. 1.

Pennsylvania: Bell's Gap R. Co. v. Christy, 79 Pa. St. 54, 21 Am. Rep. 39, 2 Keener's Cas. 1921; In re Heckman's Estate, 172 Pa. St. 185; Titus v. Catawisse R. Co., 5 Phila. 172; Insurance Bank v. Bank of United States, 7 Leg. Int. 129. See Snow v. Thompson Oil Co., 59 Pa. St. 209.

South Carolina: Bank of South Carolina v. Campbell, 2 Rich. Eq. 179. See Haslett's Ex'rs v. Wotherspoon, 1 Strob. Eq. 209.

South Dakota: Huron Printing & Bindery Co. v. Kittleson, 4 S. D. 520; Kaeppler v. Redfield Creamery Co. (S. D.) 81 N. W. 907.

Tennessee: Pittsburg & Tennessee Copper Min. Co. v. Quintrell, 91 Tenn. 693.

Texas: Weatherford, Mineral Wells & N. W. Ry. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837; McDonough v. First Nat. Bank of Houston, 34 Tex. 309; Ennis Cotton-Oil Co. v. Burks (Tex. Civ. App.) 39 S. W. 966.

Wisconsin: Buffington v. Bardon, 80 Wis. 635; Pratt v. Oshkosh Match Co., 89 Wis. 406.

An allegation that a contract was made with a corporation is sustained by proof that it was made with promoters and ratified or adopted by the corporation. Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33.

[31] Stanton v. New York & Eastern Ry. Co., 59 Conn. 272, 21 Am. St. Rep. 110.

[32] Bridgeport Electric & Ice Co. v. Meader, 72 Fed. 115.

Where an agent engaged in or-

——**Bonds.**—Bonds issued by the promoters of a corporation in its name before its organization may be ratified or adopted by its directors after its organization, and in such a case they will become the valid bonds of the corporation.[33]

——**Promissory notes.**—In like manner, a corporation may adopt or ratify a promissory note given by its promoters. If the promoters of a corporation purchase goods for it before its organization, and give a note for the price, and the corporation afterwards accepts the goods with knowledge of the facts, it thereby ratifies the note and is liable thereon.[34]

——**Leases.**—If a lease is executed to a person in trust for a corporation to be afterwards formed, and the corporation, after its organization, takes an assignment thereof, with knowledge of the terms on which it was executed by the lessor, it becomes liable in equity to pay the rent to the lessor, and it cannot avoid such liability by transferring the lease to another.[35]

——**Liens.**—If a corporation takes property purchased for it by its promoters before its creation, with knowledge of the terms of the contract of purchase, and thereby ratifies or adopts the contract, it takes the property subject to an equitable lien for the purchase price created by the dealings of the parties.[36] The same is true of other liens.[37] Of course, the corporation must have actual or constructive notice of the lien, and the knowledge of a mere promoter or corporator, who is not an officer or agent of the corporation, is not imputable to the corporation.[38]

——**Contract for services.**—A contract for services made by the promoters of a corporation on its behalf may be ratified by the

ganizing a mutual insurance company took a note as a premium note, and the corporation, when organized, accepted the benefit of his act and received the note, it was held that it was bound by all the conditions to which he agreed in connection with the note, and that it could not treat the note as a stock note. Bell v. Shibley, 33 Barb. (N. Y.) 610.

[33] Wood v. Whelen, 93 Ill. 153.

[34] Paxton Cattle Co. v. First Nat. Bank of Arapahoe, 21 Neb. 621, 59 Am. Rep. 852.

[35] Van Schaick v. Third Ave. R. Co., 49 Barb. (N. Y.) 409. See, also, In re Hickman's Estate, 172 Pa. St. 185.

[36] Bridgeport Electric & Ice Co. v. Meader, 72 Fed. 115.

[37] Burt v. Batavia Paper Mfg. Co., 86 Ill. 66.

[38] Burt v. Batavia Paper Mfg. Co., 86 Ill. 66. See post, § 104.

corporation when organized.[39] And it may thus render itself liable for past as well as future services.[40]

——**Appointment of agents.**—The appointment of an agent for a projected corporation by the promoters may be ratified by the corporation when it is organized, and such ratification will make the party the agent of the corporation. In a late California case the subscribers of an instrument preliminary to incorporation agreed thereby to take a certain number of shares in the corporation, and to pay a certain percentage of the par value thereof to one W. By the same instrument they appointed the defendants their agents and the agents of the proposed corporation, with authority to purchase property for the corporation, and to draw from W. the money paid to him, and use the same in paying for the property. It was held that until the formation of the company the defendants were the agents of the subscribers, but that their agency for the subscribers ceased when the corporation was formed, and that afterwards they became the agents of the corporation; and it was further held that, since no interest was coupled with their agency, it was competent for the corporation to remove them at any time, and appoint other agents in their place, or itself assume the custody and disposition of the money.[41]

——**(2) Implied ratification or adoption—In general.**—The ratification or adoption by a corporation of a contract made by its promoters need not necessarily be by formal vote of the stockholders or directors, unless it is so required by its charter, but it may be implied from any conduct on the part of its stockholders or officers—provided they have the requisite authority to bind the corporation—which shows an intention to adopt and be

[39] Stanton v. New York & Eastern Ry. Co., 59 Conn. 272, 21 Am. St. Rep. 110.

[40] Where a contract made with the promoters of a corporation was ratified by the corporation, and a suit was afterwards brought by the other party for its breach, it was held that the ratification related back to the date of the execution of the contract, and entitled the plaintiff to have his services rendered prior to the ratification considered in estimating his damages for the breach. Stanton v. New York & Eastern Ry. Co., 59 Conn. 272, 21 Am. St. Rep. 110.

[41] San Joaquin Land & Water Co. v. West, 94 Cal. 399.

bound by the contract. Formal action by the stockholders or directors is necessary only where it would be necessary to a similar original contract.[42]

——**Recognition of contract.**—Thus, if the board of directors or other officers of a corporation, having authority to bind it by contracts, recognize as binding upon the corporation a contract made on its behalf by its promoters before incorporation, such recognition will amount to a ratification or adoption of the contract, whether it is expressed orally, or in a letter, or otherwise,[43] or implied from conduct.[44] Mere silence or failure to object, however, when a contract or claim is mentioned, is not such a ratification as will bind the corporation.[45]

——**Acceptance of benefits of contract.**—If the promoters of a corporation, before its organization, enter into a contract for its benefit, with the understanding, expressed or implied, that the

[42] Battelle v. Northwestern C. & C. Pavement Co., 37 Minn. 89; McArthur v. Times Printing Co., 48 Minn. 319, 31 Am. St. Rep. 653, 2 Keener's Cas. 1926; Schreyer v. Turner Flouring Mills Co., 29 Or. 1; Burden v. Burden, 8 App. Div. (N. Y.) 100, 159 N. Y. 287; Huron Printing & Bindery Co. v. Kittieson, 4 S. D. 520.

[43] Schreyer v. Turner Flouring Mills Co., 29 Or. 1; Pittsburg & Tennessee Copper Min. Co. v. Quintrell, 91 Tenn. 693.

In an action against an irrigation company to compel specific performance of a contract to furnish water, the evidence showed that the promoter of the company, before its organization, employed an agent to solicit subscriptions on certain terms, and that after the company was organized, and when he was its president, he wrote to this agent, acknowledging that the contracts made by him before the company was organized were binding on the company, but directing him to make future contracts on a different basis. It was held that this was an adoption by the company of the contracts made before its organization, and that it could not afterwards change their terms. Colorado Land & Water Co. v. Adams, 5 Colo. App. 190.

[44] Huron Printing & Bindery Co. v. Kittieson, 4 S. D. 520; Wilson v. Kings County Elevated R. Co., 114 N. Y. 487; Burke v. Lincoln Valentine Co., 28 Misc. Rep. (N. Y.) 202.

Thus, a contract made by a promoter of a corporation that a person shall be appointed its counsel on a certain salary is adopted or ratified by the corporation, if the directors, after the corporation is organized, and with knowledge of the contract, allow such person to perform services as counsel and receive the salary agreed upon. Arapahoe Inv. Co. v. Platt, 5 Colo. App. 515.

And a contract by promoters of a corporation to pay a certain royalty to a patentee on articles to be manufactured by the corporation under the patent is adopted by the corporation if it manufactures such articles and pays such royalty for a while after its organization. Bommer v. American Spiral Spring Butt Hinge Mfg. Co., 81 N. Y. 468.

[45] Tift v. Quaker City Nat. Bank, 8 Pa. Co. Ct. Rep. 606, 141 Pa. St. 550.

contract will be adopted and performed by the corporation, and the corporation, after it is organized, accepts the benefit of the contract with knowledge of the facts, it is bound in equity to perform the same, for its conduct in accepting the benefit of the contract is an implied adoption of its obligations.[46] Thus, where the promoters of a railroad company entered into an agreement before its incorporation, with the trustees of a turnpike, that, if they would not oppose the passage of the charter, a bridge to be built across the turnpike should be wider than was provided in the charter, and after the charter was obtained the railroad company proceeded to build a bridge of the width authorized by the charter, it was held in equity that it was bound by the agreement, and it was enjoined from thus violating it.[47] In another case a railroad company was required by a

[46] Edwards v. Grand Junction Ry. Co., 1 Mylne & C. 650; Stanley v. Chester & Birkenhead Ry. Co., 9 Sim. 264; Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206, 13 Am. St. Rep. 23; Little Rock & Ft. Smith R. Co. v. Perry, 37 Ark. 164; Grand River Bridge Co. v. Rollins, 13 Colo. 4; Grape Sugar & Vinegar Mfg. Co. v. Small, 40 Md. 395; Battelle v. Northwestern C. & C. Pavement Co., 37 Minn. 89; Paxton Cattle Co. v. First Nat. Bank of Arapahoe, 21 Neb. 621, 59 Am. Rep. 852; Low v. Connecticut & Passumpsic Rivers R. Co., 46 N. H. 284; Rogers v. New York & T. Land Co., 134 N. Y. 197; Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. 333; Grier v. Hazard, Hazard & Co., 13 N. Y. Supp. 583; Bell v. Shibley, 33 Barb. (N. Y.) 610; Hall v. Herter Bros., 90 Hun (N. Y.) 280, 157 N. Y. 694; Weatherford, Mineral Wells & N. W. Ry. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837; City Bldg. Ass'n, No. 2, v. Zahner, 6 Ohio Dec. 1068. See, also, Pitts v. D. M. Steele Mercantile Co., 75 Mo. App. 221; Kaeppler v. Redfield Creamery Co. (S. D.) 81 N. W. 907; Haslett's Ex'r v. Wotherspoon, 1 Strob. Eq. (S. C.) 209.

Where a person rendered professional services in preparing articles of incorporation under a contract in good faith with the promoters of a corporation, and the corporation availed itself of the benefits of such services, it was held liable for the compensation. City Bldg. Ass'n, No. 2, v. Zahner, 6 Ohio Dec. 1068.

Where an electric light company received and used poles purchased before its incorporation by one of its promoters under representations that he was acting for it, and not for himself, it was held that the company was liable for the price. Davis v. Valley Electric Light Co., 61 N. Y. Supp. 580.

Where a corporation accepted the benefit of a promoter's agreement to pay the plaintiff unpaid rent of a building due from the corporation's predecessors in business, if permitted to occupy the building, and on the company's becoming incorporated such promoter was elected its president, and the company took possession of the building, it was held that it was chargeable with the president's knowledge respecting the agreement, and was bound thereby. Chase v. Redfield Creamery Co. (S. D.) 81 N. W. 951.

[47] Edwards v. Grand Junction Ry. Co., 1 Mylne & C. 650.

court of equity to specifically perform a contract to pay a certain price for land made by its promoters on its behalf in consideration of withdrawal of opposition to its charter.[48]

The doctrine that a corporation adopts a contract made by its promoters on its behalf by accepting the benefits of the contract is recognized by courts of law as well as by courts of equity.[49] If a corporation accepts a conveyance of land in pursuance of an agreement made by its promoters, it thereby adopts such agreement and is bound by its terms.[50]

——**Contracts not made on behalf of corporation.**—In England some of the courts which have held that in equity a corporation may adopt or ratify a contract made by its promoters have held that the corporation is bound by reason of its acceptance of the benefit of the contract, even though the contract may have been made with the promoters without any understanding that the corporation should adopt the same;[51] and this doctrine has also been recognized in some cases in this country.[52] The better opinion, however, both in England and with us, is against this view, and to the effect that the contract must have been made on behalf of the company, and with the understanding that it would adopt and be bound by it.[53]

——**Connected contracts.**—It has been held, in effect, in a late Texas case, that the doctrine that a corporation, in accepting the benefit of a contract made by its promoters, adopts the contract, or takes it *cum onere,* as it is said, does not mean that it adopts previous contracts connected with the contract the benefit of which it accepts, but only that it adopts the latter contract; and that, in accepting the benefits of a particular contract, the corporation, while it adopts all the obligations imposed by that con-

[48] Stanley v. Chester & Birkenhead Ry. Co., 9 Sim. 264.

[49] See the cases cited in note 46, supra.

[50] See Rogers v. New York & T. Land Co., 134 N. Y. 197.

[51] Webb v. Direct London & Portsmouth Ry. Co., 9 Hare, 129; Gooday v. Colchester & S. Ry. Co., 17 Beav. 132.

[52] Low v. Connecticut & Passumpsic Rivers R. Co., 46 N. H. 284; Hall v. Vermont & Massachusetts R. Co., 28 Vt. 401.

[53] Caledonian & Dumbartonshire Junction Ry. Co. v. Magistrates of Helensburgh, 2 Macq. H. L. Cas. 391; Little Rock & Ft. Smith R. Co. v. Perry, 37 Ark. 164, 44 Ark. 383; Rockford, Rock Island & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587.

tract, does not adopt and become liable upon a promise of its promoters in a previous contract to pay for services in procuring the contract the benefits of which are accepted. In the case referred to, a railroad company accepted a bonus raised by its promoters from certain individuals under a contract by which it was agreed that the corporation should build its road between certain points, and carry coal at a certain rate. It was held that the corporation, in accepting the bonus, adopted the contract under which it was paid, and became bound to fulfill the stipulations of that contract,—to build the road between certain points, and carry coal at a certain rate,—but that it did not thereby adopt a previous contract by the promoters to pay a person for his services in procuring the bonus.[54]

(3) Date of contract—Statute of frauds.—When it is said that a corporation may thus adopt or ratify a contract made by its promoters on its behalf, it is not meant that it may ratify the contract in the sense that a person may ratify a contract made by another as his agent without authority, so as to render it binding as of the time when it was made. There can be no ratification in this sense, for when the promoters enter into the contract there is no corporation for which they can act as agents. By adopting the contract the corporation makes a contract as of the time of the adoption.[55] This, for example, is the time the contract is to be regarded as made for the purpose

[54] Weatherford, Mineral Wells & N. W. Ry. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837.

[55] McArthur v. Times Printing Co., 48 Minn. 319, 31 Am. St. Rep. 653, 2 Keener's Cas. 1926; Weatherford, Mineral Wells & N. W. Ry. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837; Pittsburg & Tennessee Copper Min. Co. v. Quintrell, 91 Tenn. 693; Badger Paper Co. v. Rose, 95 Wis. 145; Pratt v. Oshkosh Match Co., 89 Wis. 406. Compare, however, Stanton v. New York & Eastern Ry. Co., 59 Conn. 272, 21 Am. St. Rep. 110, referred to in note 40, supra.

"The better view," said Judge Marshall in a late Wisconsin case, "is that the corporation does not become liable after its creation by 'ratification,' as the term is ordinarily understood, because ratification presumes ability to contract at the time the unauthorized contract was made. Where there is no corporation in fact, there cannot be any agent; hence the liability which the corporation incurs by adopting a contract made for its benefit before it had legal existence does not relate back to the unauthorized act, and make a contract as of that date, but the contract dates from the adoption of such act." Badger Paper Co. v. Rose, 95 Wis. 145.

of determining whether it is to be performed within a year from the making thereof, so as not to be within the statute of frauds.[56]

——**(4) Ultra vires contracts.**—It is necessary, of course, in order that a corporation may have the power to adopt or ratify a contract made by its promoters, that the contract shall be within the powers conferred upon the corporation by its charter, as will be explained in a subsequent chapter.[57] If the contract is such that it would have been *ultra vires* to enter into it in the first instance, it is *ultra vires* for it to ratify or adopt the same.[58] Thus it was held in an English case that it was *ultra vires* for a corporation established for the purpose of constructing and maintaining a railroad to adopt a contract to pay a sum of money to an individual for not opposing the passage of the company's bill in parliament.[59]

When a corporation is formed to carry on a manufacturing business which has been carried on by an individual or a partnership, it is not *ultra vires* for it to assume the execution of the manufacturing contracts made by the individual or partnership before incorporation.[60] And where subscribers agree to pay a certain sum for the construction of a creamery, each subscriber being liable for the amount of his subscription only, and also agree to incorporate for the purpose of carrying on the business, the corporation, when it is formed and accepts the cream-

[56] McArthur v. Times Printing Co., 48 Minn. 319, 31 Am. St. Rep. 653, 2 Keener's Cas. 1926.

[57] Post, § 167 et seq.

[58] Preston v. Liverpool, Manchester & N. J. Ry. Co., 5 H. L. Cas. 605; Shrewsbury v. North Staffordshire Ry. Co., L. R. 1 Eq. 593; Minneapolis Trust Co. v. Clark, 47 Minn. 108.

[59] Preston v. Liverpool, Manchester & N. J. Ry. Co., 5 H. L. Cas. 605. Compare notes 47 and 48, supra.

In Minneapolis Trust Co. v. Clark, 47 Minn. 108, the defendant, who had indorsed several notes, organized a corporation which succeeded to his business, and of which he became president and principal stockholder. The maker failed to pay the notes at maturity, and the defendant paid them with the funds of the corporation; taking renewal notes from the maker, payable to himself, which he indorsed to the corporation. It was held that, on the payment of the renewal notes, the defendant became liable to the corporation as an indorser thereon, since the assumption of the individual liability of the defendant on outstanding notes could not be considered as a part of the business to which the corporation succeeded.

[60] Louis Cook Mfg. Co. v. Randall, 62 Iowa, 244.

ery, may assume a balance due the contractors for its construction.[61]

——**(5) Authority of officer or agent.**—It is also necessary, to render the ratification or adoption by an officer or agent of a corporation of a contract made by its promoters before organization binding upon the corporation, that the ratification or adoption shall be within the authority of the officer or agent.[62]

§ 102. Right of corporation to enforce contracts made by its promoters.

As a corporation may, in most states, ratify or adopt a contract made on its behalf by its promoters before incorporation, and thus become liable thereon, it may also thus acquire the right to enforce the same. By such ratification or adoption it makes the contract its own, and may sue thereon in its own name.[63] Where a contract by the promoters of a corporation with the owner of land, under which the latter agrees to sell the land to the corporation when organized, is adopted by the corporation, it may sue for specific performance.[64]

In Massachusetts, as we have seen, it is held that, where a contract is made by the promoters of a projected corporation,

[61] Davis v. Dexter Butter & Cheese Co., 52 Kan. 693.

[62] See White v. Westport Cotton Mfg. Co., 1 Pick. (Mass.) 215, 11 Am. Dec. 168, where it was held that a corporation was not bound by a note given by its agent for a debt contracted by its members before they were incorporated, unless he had express authority by vote. See, also, Tift v. Quaker City Nat Bank, 8 Pa. Co. Ct. Rep. 606, 141 Pa. St. 550 See post, chapter xxiv. as to the authority of officers and agents of corporations.

[63] Anderson v. West Kentucky College, 10 Ky Law Rep. 725; Bedford & Cambridge Ry. Co. v. Stanley, 2 Johns. & H. 746.

If the owners of land enter into a contract with the promoters of a railroad company to sell the company a right of way at a certain price, the company may adopt or ratify the contract, and sue for specific performance thereof. Bedford & Cambridge Ry. Co. v. Stanley, 2 Johns. & H. 746.

T. contracted to buy an interest in two oil wells. Afterwards an oil company was incorporated, to which T. transferred his interest, the vendors in the meantime receiving and selling the oil. By agreement, the vendors made the deal to the corporation, and dated it back to the date of the contract, agreeing to deliver T.'s share of the oil to the company. It was held that assumpsit in the name of the company for oil received by the vendors between the contract and the incorporation could be maintained. Snow v. Thompson Oil Co., 59 Pa. St. 209.

[64] Scadden Flat Gold Min. Co. v. Scadden, 121 Cal. 33.

although in its name and for its benefit, the corporation cannot become a party thereto, either by adoption or ratification, and therefore it cannot sue on such a contract.[65]

§ 103. Liability of corporations for services and expenses of promoters.

It has been held in some states that, if the promoters of a corporation necessarily perform services or incur expenses, as, for example, in procuring the necessary preliminary subscriptions to the capital stock, with the expectation that they shall be compensated,[66] a promise to pay by the corporation, after its organization and acceptance of the benefits of such services or expenses, will be implied.[67] The better opinion and the weight of authority, however, is to the effect that there is no such liability on the part of the corporation to its promoters, in the absence of an express promise by it after its organization, unless, as is sometimes the case, such a liability is imposed by its charter or by the general law.[68] An express promise to pay, by the cor-

[65] Abbott v. Hapgood, 150 Mass. 248, 15 Am. St. Rep. 193.

[66] See Hall v. Vermont & Massachusetts R. Co., 28 Vt. 401, where it was held that the services of the promoters of a corporation in procuring the passage of the act of incorporation were voluntarily rendered, and did not raise an implied promise to pay therefor on the part of the corporation.

[67] Low v. Connecticut & Passumpsic Rivers R. Co., 45 N. H. 284; Hall v. Vermont & Massachusetts R. Co., 28 Vt. 401; Farmers' Bank of Vine Grove v. Smith (Ky.) 49 S. W. 810. See, also, Little Rock & Ft. Smith R. Co., 37 Ark. 164, 44 Ark. 383; Hayward v. Leeson, 176 Mass. 310.

[68] Melhado v. Porto Algere, New Hamburgh & B. Ry. Co., L. R. 9 C. P. 503; New York & New Haven R. Co. v. Ketchum, 27 Conn. 170; Rockford, Rock Island & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; Franklin Fire Ins. Co. v. Hart, 31 Md. 60; Marchand v. Loan & Pledge Ass'n, 26 La. Ann. 389; Bell's Gap R. Co. v. Christy, 79 Pa. St. 54, 21 Am. Rep. 39, 2 Keener's Cas. 1921; Security Co. v. Bennington Battle Monument Ass'n, 70 Vt. 201; Ritchie v. McMullen (C. C. A.) 79 Fed. 522, affirming 64 Fed. 253.

In New York & New Haven R. Co. v. Ketchum, 27 Conn. 170, a director of a railroad corporation had before and during its organization rendered special services in procuring subscriptions to its stock and in its organization, and had done so in the expectation of compensation. The stockholders voted to grant him a free pass over the road for himself and family during his life, which grant was inadequate as a compensation for the services, but was accepted by him as such. Some years afterwards, the stockholders rescinded the vote. It was held, in an action brought by the company for railroad fares accruing after that time, that the services rendered created no indebtedness on the part of the corporation, and could not consti-

poration after its organization, is on a sufficient consideration, and is binding upon it without any new consideration.[69]

§ 104. Knowledge of promoters as affecting the corporation.

Since the promoters of a projected corporation are not its agents and cannot bind it, their knowledge of facts is not imputable to the corporation when formed, unless they are then acting as its managing officers, or as its agents in the matter to which the facts relate. Thus, where a corporation is organized to purchase a patent right, it is not affected with a promoter's knowledge of defects in the title to the patent right.[70] And a corporation which purchases property is not chargeable with a promoter's knowledge of an incumbrance thereon.[71]

The knowledge of the principal promoter of a corporation, who becomes its manager when it is organized, is imputable to the corporation, although he may have acquired his knowledge as promoter; but this is because of his position as manager, and not because of his position as promoter.[72]

§ 105. Admissions and declarations of promoters as affecting corporation.

Admissions and declarations by a promoter of a corporation are not binding upon or admissible in evidence against the corporation unless it is shown that it has ratified the same, or otherwise assumed responsibility therefor.[73]

tute a consideration for its contract.

The mere silence of the board of directors of a corporation, or their failure to object when a promoter's claim to compensation is mentioned, is not such an act of ratification as will bind the company. Tift v. Quaker City Nat. Bank, 8 Pa. Co. Ct. R. 606, 141 Pa. St. 550.

A corporation is not liable for the services of a director rendered as the secretary of the promoters with the understanding that the corporation would pay him. West Point Telephone & Telegraph Co. v. Rose, 76 Miss. 61.

[69] See Western Screw Mfg. Co. v. Cousley, 72 Ill. 531, 2 Keener's Cas. 1918; Franklin Fire Ins. Co. v. Hart, 31 Md. 59.

[70] Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co., 20 Fed. 699; Racine Seeder Co. v. Joliet Wire Check Rower Co., 27 Fed. 367. See, also, Averill v. Barber, 6 N. Y. Supp. 255. Compare, however, Young Reversible Lock-Nut Co. v. Young Lock-Nut Co., 72 Fed. 62; National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co., 73 Fed. 491.

[71] Burt v. Batavia Paper Mfg. Co., 86 Ill. 66.

[72] Huron Printing & Bindery Co. v. Kittleson, 4 S. D. 520.

[73] McCallum v. Purssell Mfg. Co., 1 N. Y. Supp. 428; First Nat. Bank

§ 106. Demand upon promoter as demand upon corporation.

A demand made upon the mere promoter of a corporation is not a demand upon the corporation. Thus, in an action of trover against a corporation, in which it is necessary to show a demand upon the corporation for the property, in order to establish a conversion, it is not enough to prove a demand made upon a promoter of the corporation, although he may have afterwards become a corporator and officer thereof.[74]

§ 107. Liability of promoters on contracts made before incorporation.

When promoters of a projected corporation enter into a contract before its organization, their liability on the contract will depend upon the terms of the contract and the intention of the parties. They are not personally liable if it is understood that the other party shall look to the corporation only, when it is formed;[75] but they are liable in the absence of such an understanding.[76]

of Wellston v. Armstrong, 42 Fed. 193.

[74] McCallum v. Purssell Mfg. Co., 1 N. Y. Supp. 428.

[75] Landman v. Entwistle, 7 Exch. 632; Higgins v. Hopkins, 3 Exch. 163; Rennie v. Clarke, 5 Exch. 292; Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356; Carmody v. Powers, 60 Mich. 26; Whetstone v. Crane Bros. Mfg. Co., 1 Kan. App. 320. See, also, Wood v. Argyll, 6 Man. & G. 928; Lake v. Argyll, 6 Q. B. 477; In re Heckman's Estate, 172 Pa. St. 185.

[76] Bell v. Francis, 9 Car. & P. 66; Kelner v. Baxter, L. R. 2 C. P. 174; Scott v. Ebury, L. R. 2 C. P. 255; Atwood v. Small, 7 Barn. & C. 390; Riley v. Packington, L. R. 2 C. P. 536; Collingwood v. Berkeley, 15 C. B. (N. S.) 145; Hersey v. Tully, 8 Colo. App. 110; Carmody v. Powers, 60 Mich. 26; Munson v. Syracuse, Geneva & C. R. Co., 103 N. Y. 58, 76; Hub Pub. Co. v. Richardson, 13 N. Y. Supp. 665; Roberts Mfg. Co. v. Schlick, 62 Minn. 332; Whetstone v. Crane Bros. Mfg. Co., 1 Kan. App. 320; Hurt v. Salisbury, 55 Mo. 310; Martin v. Fewell, 79 Mo. 401; Pratt v. Finkle, 99 Ga. 616; Ennis Cotton-Oil Co. v. Burks (Tex. Civ. App.) 39 S. W. 966; Sandusky Coal Co. v. Walker, 27 Ont. 677; American Paper Bag Co. v. Van Nortwick, 52 Fed. 752.

A promoter is not liable on contracts made by other promoters before he became connected with the enterprise, unless he has done something to make him a party thereto. See Newton v. Belcher, 12 Q. B. 912, 13 Jur. 253, where it was held that a member of a provisional committee for the formation of a company, who became a member of the committee after the making of a contract for services for the company, was not liable for such services, although performed after he became a member. See, also, Beale v. Mouls, 10 Q. B. 976; Whitehead v. Barron, 2 Moody & R. 248; Bremner v. Chamberlayne, 2 Car. & K. 560.

Where an attorney was employed by the promoters of a corporation to prepare the incorporation papers, and was authorized by them to contract for necessary printing, it was held that they were personally liable on such a contract when made by him.[77] So, where certain persons associated to establish a bank, and at a meeting of the association an agent was appointed to attend the legislature for the purpose of procuring a charter, and he attended accordingly, but failed to obtain a charter, it was held that the associates were jointly liable to him for his services.[78] And where purchasers of the rights and franchises of a corporation issued bonds before organizing as a new corporation, it was held that they were personally liable thereon, notwithstanding the fact that they used the name of the old corporation in issuing them.[79] Other cases are referred to in the note below.[80]

[77] Hersey v. Tully, 8 Colo. App. 110.

As to the right of a person to recover compensation from a promoter of the reorganization of a railroad company for services performed by him under a contract with the promoter, see Babbitt v. Gibbs, 150 N. Y. 281.

[78] Sproat v. Porter, 9 Mass. 300. See, also, Bell v. Francis, 9 Car. & P. 66; Kerridge v. Hesse, 9 Car. & P. 200.

[79] Chaffe v. Ludeling, 27 La. Ann. 607.

[80] In McFall v. McKeesport & Y. Ice Co., 123 Pa. St. 253, the owners of land, before procuring an act of incorporation, agreed that a contract for a building on the land should be let at fixed sum to one of their number, who should sublet it for less, and that the expense of the building and the profits should be divided among them in the ratio of the stock held by each. This was done, and the price of the building was paid in shares issued to each. It was held that they were liable as joint contractors to a materialman furnishing supplies on the order of the subcontractor.

If the promoter of a corporation purchases land, and gives a mortgage in his own name to secure the price of the same, he is personally liable for any deficiency after foreclosure of the mortgage, although it may be known by the seller that he intends to convey the land to a corporation to be formed, unless it is understood that he is acting for the corporation only. Lewis v. Weidenfeld, 114 Mich. 581.

In Kirschmann v. Lediard, 61 Barb. (N. Y.) 573, the plaintiff agreed to sell a patent and certain tools and materials, and to execute all proper conveyances therefor to the defendants, who, on their part, agreed to organize a company to purchase the same, and to pay to the plaintiff a certain amount in stock of the company. It was held that the agreement was personal with the defendants, and the plaintiff could recover from them damages for failure to organize the company.

In a South Carolina case, certain persons had signed articles of association whereby they agreed to unite in forming a corporation for the building of a theater, and to

Adoption of contract by corporation.—When a promoter binds himself personally by a contract, the subsequent adoption or assumption of the contract by the corporation, when organized, will not relieve him from liability, even though the corporation may thereby become liable, unless the other party to the contract consents, so that there is a novation; for it is a well-settled principle of the law of contracts that a party to a contract cannot relieve himself from its obligations by the substitution of another person, without the consent of the other party.[81]

If, however, on the adoption by a corporation of a contract made by its promoters, it is agreed between all the parties that the corporation alone shall be liable, and the promoters released, there is a novation, the release of the promoters is supported by a sufficient consideration, and no action will afterwards lie against them on the contract.[82] Such an agreement may be implied from the conduct of the parties.[83] So, when a con-

pay for the number of shares placed opposite their names, at a certain rate per share. Trustees were appointed to transact the business of the corporation, and they, before the association was incorporated, purchased a site, proceeded to erect a theater, and contracted debts over and above the sums subscribed. Afterwards the association was incorporated. It was held, under these circumstances, that the associates were jointly and severally liable as partners for all the debts contracted before the act of incorporation. Haslett's Ex'rs v. Wotherspoon, 2 Rich. Eq. (S. C.) 395.

[81] See Keiner v. Baxter, L. R. 2 C. P. 174; Scott v. Ebury, L. R. 2 C. P. 255; Humble v. Hunter, 12 Q. B. 310; Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356; Chapin v. Longworth, 31 Ohio St. 421.

[82] Van Vlieden v. Welles, 6 Johns. (N. Y.) 85. And see Ennis Cotton-Oil Co. v. Burks (Tex. Civ. App.) 39 S. W. 966; Case Mfg. Co. v. Soxman, 138 U. S. 431.

In Shields v. Clifton Hill Land Co., 94 Tenn. 123, 45 Am. St. Rep. 700, the plaintiff gave to one L. an option to purchase land, agreeing to convey the same to him or his assignee on payment, within a certain time, of an amount in cash, and reserving a vendor's lien for the balance. Several persons, with no distinct agreement as to who should ultimately be the purchaser, furnished L. the money with which the cash payment was made, and later agreed to form a corporation, which should become the purchaser. The corporation was formed, and L. assigned his option to it, and the plaintiff executed to it a deed, and took its notes for the balance. On default, plaintiff had judgment to enforce the vendor's lien. It was held that the incorporators were not personally liable as partners for the balance due after the proceeds of the sale had been applied.

[83] In a New York case it appeared that the deacons and elders of an unincorporated church called the plaintiff as their minister, and entered into an agreement with him for a certain yearly salary, which he regularly received from them for the time being, both

tract is made with the promoters of a corporation with the understanding at the time that it is to be assumed by the corporation when formed, and the corporation is formed and the contract assumed by it, the other party cannot hold the promoters personally liable on the contract.[84]

§ 108. Rights of promoters on contracts made before incorporation.

The rights of promoters under a contract made by them before incorporation will depend upon the terms of the particular contract. As they are personally liable thereon, in the absence of agreement to the contrary, even when they undertake to bind the projected corporation,[85] so they are personally entitled to enforce the same, and may maintain an action thereon in their own name.[86]

In Massachusetts, as we have seen, it is held that a corporation, after it has been organized, cannot ratify or adopt a con-

before and after the church was incorporated, without ever looking to them individually, and when the church was incorporated, he was a party to the act of incorporation, and afterwards frequently recognized it as a corporation. On being dismissed, he brought an action against the surviving parties to the original contract in their individual capacity. It was held that, by the mutual understanding of the parties, the original contract was waived, and that, after the incorporation of the church, the previous contract became extinguished, as a private and simple contract; and the corporation, acting by their seal, having assumed the contract, and become the debtor of the plaintiff with his assent and concurrence, the defendants were not responsible to him in their individual capacity. Van Vlieden v. Welles, 6 Johns. 85.

[84] In re Heckman's Estate, 172 Pa. St. 185, where a lease was made to a promoter with the understanding that it was to be assumed by the corporation when organized. And see Chicago Building & Mfg. Co. v. Talbotton Creamery & Mfg. Co., 106 Ga. 84; Smith v. Parker, 148 Ind. 127.

[85] Ante, § 107.

[86] Abbott v. Hapgood, 150 Mass. 248, 15 Am. St. Rep. 193. In this case, where a contract had been made in the name and for the benefit of a projected corporation, and the corporation had unsuccessfully sued thereon, it was held that the judgment was no bar to an action by the individuals who made the contract.

It was also held that, where suit is brought by the members composing a projected corporation, for breach of contract made by them in the name of the corporation before its creation, the plaintiffs are not limited to the damages they themselves have suffered, independently of their membership in the asociation, but may recover damages suffered by the new organization in being unable to carry on a profitable business on account of the defendant's failure to perform the contract.

tract made by its promoters before incorporation, and thereby become a party to the contract, and an attempted ratification or adoption can give no right to sue on the contract. Unless there is a novation, or a new contract, by which the corporation is substituted for the promoters, as a party, or introduced as a party, any action to enforce the contract, or recover damages for its breach, must be brought by the promoters individually.[87]

In the other states, however, where it is held that a contract made by the promoters of a corporation may be adopted or ratified by the corporation, such adoption or ratification makes the corporation a party to the contract, so that it may sue thereon in its own name,[88] and may bar any action thereon by the promoters who made the contract. In a federal case, the defendant and one W. executed an agreement under seal, providing for the erection of waterworks by a proposed corporation, in whose behalf W. acted, the defendant covenanting to pay to such corporation for the use of water a certain sum yearly; and it was stipulated that the agreement should inure to the exclusive benefit of the corporation, and should be adopted and executed by it within a certain time after its creation. The corporation, having been created, within the prescribed time adopted and executed the agreement under its corporate seal. In an action for subsequent breaches of the defendant's covenant, brought by W. for the use of the corporation, it was held that the agreement between the defendant and W. was superseded by the contract between the defendant and the corporation, and that the right of action was not in W., but in the corporation.[89]

§ 109. Rights and liabilities of promoters inter se.

When several persons join in the promotion of a corporation, questions arise as to their rights and liabilities *inter se*. Of course, if there is any express contract between them, their rights and liabilities will depend upon its terms.[90] In the

[87] See Abbott v. Hapgood, 158 Mass. 248, 15 Am. St. Rep. 193.

[88] Ante, § 101(c).

[89] Wiley v. Borough of Towanda, 26 Fed. 594.

[90] See Kirschmann v. Lellard, 61 Barb. (N. Y.) 573; Crow v. Green, 111 Pa. St. 637; Marston v. Singapore Rattan Co., 163 Mass. 296; Babbitt v. Gibbs, 150 N. Y. 281;

absence of any agreement to the contrary, it is well settled that one of several promoters, who expends money in the promotion of the corporation, or who is compelled to pay money to a third person by reason of his dealings as a promoter, may sue the other promoters for contribution.[91] One promoter, however, cannot recover from the other promoters for his services, in the absence of an agreement to pay him therefor.[92]

§ 110. Liability of promoters to the corporation and to stockholders.

(a) Who are promoters.—The promotion of a joint-stock corporation is getting it up or organizing it, and procuring subscriptions to its capital stock, and any one who actively assists in doing this is a promoter. He may become a stockholder in the corporation when it is formed, or both a stockholder and an officer, but this is not necessarily the case. As was said in a California case, a promoter of a corporation is a person who, by his active endeavors, assists in procuring the formation of the company and the subscription of its shares, whether he afterwards becomes connected with the company or not.[93] A per-

Bates v. Wilson, 14 Colo. 140; Ireland v. Globe Milling & Reduction Co., 20 R. I. 190; Dennison v. Chapman, 105 Cal. 447; Sims v. Tyrer (Va.) 26 S. E. 508; Schantz v. Oakman, 10 App. Div. 151.

[91] Batard v. Hawes, 2 El. & Bl. 287, 17 Jur. 1154; Boulter v. Peplow, 9 C. B. 493, 14 Jur. 248; Spottiswoode's Case, 6 De Gex, M. & G. 345; Edgar v. Knapp, 5 Man. & G. 753, 7 Jur. 583.

[92] Holmes v. Higgins, 1 Barn. & C. 74; Parkin v. Fry, 2 Car. & P. 311; Wilson v. Curzon, 16 Mees. & W. 532, 11 Jur. 47; Baily v. Burgess, 48 N. J. Eq. 411.

[93] Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610. See, also, Woodbury Heights Land Co. v. Lowdenslager, 55 N. J. Eq. 78, 2 Keener's Cas. 1903, 56 N. J. Eq. 411, 58 N. J. Eq. 556; Burbank v. Dennis, 101 Cal. 90; South Joplin Land Co. v. Case, 104 Mo. 572, 578; Huron Printing & Bindery Co. v. Kittleson, 4 S. D. 520; Bagnall v. Carlton, 6 Ch. Div. 371, 381; Twycross v. Grant, 2 C. P. Div. 469; Emma Silver Min. Co. v. Lewis, 4 C. P. Div. 396; Pitts v. D. M. Steele Mercantile Co., 75 Mo. App. 221; In re Olympia, 67 Law J. Ch. 433, [1898] 2 Ch. 153; Bosher v. Richmond & Harrisonburg Land Co., 89 Va. 455, 37 Am. St. Rep. 879.

One who engages with the owner of a tract of land in organizing a corporation to purchase the land, by procuring subscribers, and who frames the prospectus, and becomes one of the first subscribers, is clearly a promoter of the corporation. Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78, 88, 2 Keener's Cas. 1903, 56 N. J. Eq. 411, 58 N. J. Eq. 556.

"The term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called 'floating' it) and also the idea of some

son is not in the position of a promoter except in so far as he is thus assisting in the formation of the company, and is acting, or assuming to act, in its behalf.[94]

(b) **The fiduciary relation—Secret profits.**—It has been said that a promoter of a corporation is its agent,[95] but this is not true. Properly speaking, the promoters of a projected corporation cannot be said to be its agents in any sense, for as yet there is no corporation, and there cannot be an agent where there is no principal; but they may be the agents of the persons who are to become and do become members or stockholders in the corporation when formed. However this may be, they are certainly in a position analogous to that of an agent. Their relation to the persons who become corporators or subscribers to stock,[96] and their relation to the proposed corporation when formed, is a fiduciary relation, or a relation of trust and confidence, and for this reason it is well settled that they will not be permitted to take advantage of their position in order to make a secret profit out of their transactions on behalf of the proposed corporation or of the corporators, or out of their dealings with the corporation or corporators. If they do so, they will not be allowed to retain their advantage or gain, but the transaction may be set aside in equity, or they may be compelled to account or be held liable to respond in damages.[97]

duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it." Lindley, J., in Emma Silver Min. Co. v. Lewis, 4 C. P. Div. 407.

[94] St. Louis, Ft. Scott & W. R. Co. v. Tiernan, 37 Kan. 606. See, also, under an English statute, In re Great Western Forest of Dean Coal Consumers' Co., 31 Ch. Div. 496; In re Imperial Land Co. of Marseilles, L. R. 10 Eq. 298.

[95] See 2 Cook, Corp. § 651.

[96] See Williams v. Page, 24 Beav. 654; Brewster v. Hatch, 122 N. Y. 349, 19 Am. St. Rep. 498.

[97] Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, affirming 5 Ch. Div. 73; Gover's Case, 1 Ch. Div. 182; Bagnall v. Carlton, 6 Ch. Div. 371; Emma Silver Min. Co. v. Grant, 11 Ch. Div. 918; Emma Silver Min. Co. v. Lewis, 4 C. P. 396; Chandler v. Bacon, 30 Fed. 538; Krohn v. Williamson, 62 Fed. 869, 66 Fed. 655; Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610; Burbank v. Dennis, 101 Cal. 90; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 42 Am. St. Rep. 159; Emery v. Parrott, 107 Mass. 95; Hayward v. Leeson, 176 Mass. 310; Cook v. Southern Columbia Climber Co., 75 Miss. 121; South Joplin Land Co. v. Case, 104 Mo. 572; Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78, 2 Keener's Cas. 1903, 56 N. J. Eq. 411, 58 N. J. Eq. 556; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219; Getty v.

To render a promoter of a corporation thus liable to account for secret profits made by him in transactions on behalf of the corporation, it is not necessary to show that there was a fraudulent intent on his part. It is enough if the profits were made secretly, and without the consent of the corporators.[98]

Devlin, 54 N. Y. 403, 70 N. Y. 504; Brewster v. Hatch, 122 N. Y. 349, 19 Am. St. Rep. 498; Dillon v. Commercial Cable Co., 87 Hun (N. Y.) 444; McElhenny's Appeal, 61 Pa. St. 188; Simons v. Vulcan Oil & Min. Co., 61 Pa. St. 202, 100 Am. Dec. 628; Short v. Stevenson, 63 Pa. St. 95; Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Rice's Appeal, 79 Pa. St. 168; Huron Printing & Bindery Co. v. Kittleson, 4 S. D. 520; Central Land Co. v. Obenchain, 92 Va. 130; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149; Franey v. Warner, 96 Wis. 222; Fountain Spring Park Co. v. Roberts, 92 Wis. 345; Hebgen v. Koeffier, 97 Wis. 313; Limited Inv. Ass'n v. Glendale Inv. Ass'n, 99 Wis. 54; In re Hess Mfg. Co., 23 Can. Sup. 644; Bosher v. Richmond & Harrisonburg Land Co., 89 Va. 455, 37 Am. St. Rep. 879.

See, also, In re Olympia, 67 Law J. Ch. 433, [1898] 2 Ch. 153; Salomon v. Salomon & Co. [1897] App. Cas. 22; Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate [1899] 2 Ch. 392; Exter v. Sawyer, 146 Mo. 302; Colton Improvement Co. v. Richter, 26 Misc. Rep. (N. Y.) 26.

The burden is on the promoter, seeking to retain profits on a sale to the corporation, to show that his dealings were fair, and that he took no undue advantage of subscribers. Colton Improvement Co. v. Richter, 26 Misc. Rep. (N. Y.) 26, citing Sage v. Culver, 147 N. Y. 247; Smith v. Ogilvie, 127 N. Y. 148; Parker v. Nickerson, 112 Mass. 195.

A promoter of a corporation, whose duty it is to disclose what profits he is making in transactions with the corporation, does not perform such duty by making a statement which does not disclose the facts, but merely contains something which, if followed up by further investigation, will enable the inquirer to ascertain the facts. In re Olympia, 67 Law J. Ch. 433, [1898] 2 Ch. 153.

A promoter of a corporation who acquires the title to land, acting for the corporation in pursuance of an agreement with the other promoters, and who refuses to turn the land over to the corporation, may be held liable in equity as a constructive trustee. Nestor v. Gross, 66 Minn. 371.

To hold one promoter responsible for the fraud of other promoters, it must be shown that he participated therein. Benton v. Minneapolis Tailoring & Mfg. Co., 73 Minn. 498.

In order that a corporation may recover from a promoter secret profits made by him, the fraud must have been perpetrated against the corporation or against the subscribers to its stock as such. Where A. and others, owning land which they had bought for $1,000 per acre, agreed to form a corporation and transfer the land to it at $1,500 per acre, taking stock in payment, and A. afterwards sold an interest in his land to B. at $1,325 per acre, representing that it had cost him that amount, with the understanding that when the land should be transferred to the corporation, B., as well as the others, should be paid for his interest in shares at the rate of $1,500 per acre.—it was held that there was no liability to the corporation for the profits thus made by A., as his fraud was personal to B., and the right of action therefor was his. Spaulding v. North Milwaukee Town Site Co. (Wis.) 81 N. W. 1064.

[98] Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78, 2

This principle clearly applies where a person purchases property while acting as a promoter of a corporation, or buys an option to purchase the same, and then sells it to the corporation at an advance, misrepresenting or concealing the price paid by him. In such a case he perpetrates a fraud upon the corporation and the other stockholders, and may be compelled to disgorge his secret profits in the transaction.[99] The principle also applies where a person who owns property, or has an option to purchase property, promotes a corporation for the purpose of selling to it, and misrepresents or conceals the price paid by him in order to effect the sale.[100] And it applies where a person acts as a promoter in organizing a corporation to purchase a patent or other property from a third person, and receives a

Keener's Cas. 1903, 56 N. J. Eq. 411, 58 N. J. Eq. 556; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149; Chandler v. Bacon, 30 Fed. 538.

Full disclosure of all material facts by promoters who sell property to and become directors of the company promoted is necessary. If there has been concealment, honesty of purpose on their part, with an intention to act for the benefit of the company, will not avail them as a defense to an action for rescission. The mere fact of the disclosure of the fiduciary relation, and of the double character in which the promoters are acting, will not discharge them from the obligation of making a complete and candid disclosure of all material facts. This obligation will exist so long as they retain control of the affairs of the company, and, if not fulfilled, they will be treated as wrong doers, whether there was any actual fraudulent intent or not. Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 Ch. 392.

[99] Simons v. Vulcan Oil & Min. Co., 61 Pa. St. 202, 100 Am. Dec. 628; Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610; South Joplin Land Co. v. Case, 104 Mo. 572; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149; Woodbury Heights Land Co. v. Lowdenslager, 55 N. J. Eq. 78, 2 Keener's Cas. 1903, 56 N. J. Eq. 411, 58 N. J. Eq. 556; Brewster v. Hatch, 122 N. Y. 349, 19 Am. St. Rep. 498; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219; Exter v. Sawyer, 146 Mo. 302; Bosher v. Richmond & Harrisonburg Land Co., 89 Va. 455, 37 Am. St. Rep. 879.

[100] Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, affirming 5 Ch. Div. 73; Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate [1899] 2 Ch. 392; Burbank v. Dennis, 101 Cal. 90; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149; South Joplin Land Co. v. Case, 104 Mo. 572; Getty v. Devlin, 54 N. Y. 403, 70 N. Y. 504; Rice's Appeal, 79 Pa. St. 168.

Promoters of a corporation who falsely represent that the price paid by the corporation for property conveyed by them to the corporation is the cost thereof to themselves are liable to the stockholders for their profits in the transaction, notwithstanding the fact that the property is worth the amount paid by the corporation. Burbank v. Dennis, 101 Cal. 90.

part of the purchase money, or a commission, under a secret agreement with the vendor.[101]

A secret agreement between the directors of a corporation and its promoters, by which the promoters are to receive a share of the profits before any dividends are paid, is invalid, being a fraud upon the stockholders.[102]

And it is a fraud upon a corporation and its stockholders for a promoter to receive stock in the corporation, under a secret agreement with the directors, without paying what other stockholders pay;[103] or for a promoter to receive stock for property turned in to the corporation at an overvaluation, or for services for which there is no liability on the part of the corporation.[104]

——**Liability of persons conspiring with promoters.**—Persons who conspire with promoters of a corporation to induce it to purchase property at a certain price, upon the representation that it is a reasonable price, and the one which has been agreed to be paid to the owner, whereas it is greatly in excess of the sum agreed to be paid, are, equally with the promoters,

[101] Bagnall v. Carlton, 6 Ch. Div. 371; Emma Silver Min. Co. v. Grant, 11 Ch. Div. 918; Emma Silver Min. Co. v. Lewis. 4 C. P. Div. 396; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 42 Am. St. Rep. 159; Central Land Co. v. Obenchain, 92 Va. 130; Chandler v. Bacon, 30 Fed. 538; Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78, 2 Keener's Cas. 1903, 56 N. J. Eq. 411, 58 N. J. Eq. 556; Emery v. Parrott, 107 Mass. 95.

Where a promoter of a corporation secretly agreed with a patentee to form the corporation to buy his patents, the patentee to pay him half of the price received, and induced others to subscribe for stock in the proposed corporation by representing that he was subscribing on equal terms with the rest, and afterwards, as a director of the corporation, voted for a resolution to buy the patents, it was held that the corporation might recover of him his secret profits, and that it was not bound to rescind the purchase. Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 42 Am. St. Rep. 159.

A recital in the prospectus of a company that, if the company takes and holds certain lands, it shall pay therefor "actual cost," means that it shall pay for the lands the actual price paid to the owners thereof, excluding therefrom all profits to promoters received as commissions from the owners. Central Land Co. v. Obenchain, 92 Va. 130.

[102] Dillon v. Commercial Cable Co., 87 Hun (N. Y.) 444.

[103] Emery v. Parrott, 107 Mass. 95; Chandler v. Bacon, 30 Fed. 638; Brewster v. Hatch, 122 N. Y. 349, 19 Am. St. Rep. 498; Emma Silver Min. Co. v. Grant, 11 Ch. Div. 918; Emma Silver Min. Co. v. Lewis, 4 C. P. Div. 396.

[104] Boulton Carbon Co. v. Mills, 78 Iowa, 460; In re Eddystone Marine Ins. Co., 68 Law T. (N. S.) 408, 69 Law T. (N. S.) 363; Hayward v. Leeson, 176 Mass. 310.

liable for the secret profits made on the sale of the property to the corporation, although it is not alleged that such persons, other than the promoters, had any dealings with the corporation or its members, or occupied fiduciary relations towards them, or made false representations to the stockholders, or knew that any were made. This is on the well-established principle that "where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains or the degree of his activity in the scheme."*

——**When the rule is inapplicable.**—The rule that a promoter of a corporation cannot make a profit in selling property to the corporation only applies where he acts, or assumes to act, on behalf of the corporators or the proposed corporation, or where, for some other reason, there is a fiduciary relation between him and the corporation or the members of the corporation.[105] It does not apply when a person who has acted as one of the promoters of a corporation deals with it, through its duly-authorized officers or agents, after its organization, and sells its property owned by him, but not purchased when acting as promoter. He is not then acting in a fiduciary relation, but is in the same position as any other person who might sell to the corporation would occupy. And it can make no difference in such a case that he was one of the promoters, or the sole promoter, of the corporation, or that he purchased the property for the purpose of afterwards selling it to the corporation at a profit, or that he does not, in selling it, inform the officers of the corporation of the price which he paid for it.[106]

*Fountain Spring Park Co. v. Roberts, 92 Wis. 345, 53 Am. St. Rep. 917.

[105] St. Louis, Ft. Scott & W. R. Co. v. Tiernan, 37 Kan. 606, 630; Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Central Land Co. v. Obenchain, 92 Va. 130.

[106] Ladywell Min. Co. v. Brookes, 34 Ch. Div. 398; Gover's Case, 1 Ch. Div. 182; Densmore Oil Co. v. Densmore, 64 Pa. St. 43; McElhaney's Appeal, 61 Pa. St. 188; Simons v. Vulcan Oil & Min. Co., 61 Pa. St. 202, 100 Am. Dec. 628; Lungren v. Pennell, 10 Wkly. Notes Cas. (Pa.) 297; Central Land Co. v. Obenchain, 92 Va. 130; Milwaukee Coal Storage Co. v. Dexter, 99 Wis. 214; St. Louis, Ft. Scott & W. R. Co. v. Tiernan, 37 Kan. 606; Plaquemines Tropical

In a leading English case in the house of lords it was held, in effect, that persons who purchase property, and then act as promoters in creating a company to purchase the same from them, occupy a fiduciary position towards the company, and must faithfully disclose to the company all the facts which apply to the property, and which would influence the company in determining the reasonableness of acquiring it. Lord Cairns said in this case: Promoters "stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and molding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint-stock company, and then sell his property to it; but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and

Fruit Co. v. Buck, 52 N. J. Eq. 219.

In a federal case, two persons who had, for a small sum, purchased a roadbed, the construction of which cost only $2,000, caused a railroad company to be organized, and, with others, became directors thereof, and while in this relation contracted with the directors to sell the roadbed to the company for $200,000 cash or bonds, and $3,600,000 of the capital stock. The sale was formally ratified at a meeting of the directors, and entered on the records of the company; and afterwards the stockholders unanimously approved the purchase. At the time of the sale there were no stockholders, and the stock thus issued was all that had been subscribed. The company had no property except its charter and the roadbed, and the value of the notes and stock issued to these parties had no market value. Under these circumstances, it was held that the sale was not fraudulent. Stewart v. St. Louis, Ft. Scott & W. R. Co., 41 Fed. 736.

intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person."[107]

In a leading Pennsylvania case it was said by Judge Sharswood: "There are two principles applicable to all partnerships or associations for a common purpose of trade or business, which appear to be well settled on reason and authority. The first is, that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They were in no sense agents or trustees in the original purchase, and it follows that there is no confidential relation between the parties which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy. * * * The second principle is, that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs.[108]

[107] Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, 1236, affirming 5 Ch. Div. 73.

In a later case (decided in 1899) the above case was distinguished, and it was held that the promoters of a corporation are under no duty to provide it with an independent board of directors when the real truth is disclosed to those who are induced by the promoters to join the company, and that, where the promoters of a corporation sell property to it, the sale will not be set aside under such circumstances merely because the board of directors were not independent. Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 Ch. 392.

[108] Densmore Oil Co. v. Densmore, 64 Pa. St. 43, 49, 50.

(c) Remedies of corporation and of stockholders for fraud of promoters.—When the promoter of a corporation fraudulently makes a secret profit in transactions on behalf of or with the corporation, there are several remedies against him.

In the first place, the corporation may restore, or offer to restore, what it has received, and sue to set the transaction aside and recover what it has parted with.[109] Or it may maintain a suit in equity to compel the promoter to account to it for the secret profits made by him,[110] or an action of assumpsit to re-

[109] Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, affirming 5 Ch. Div. 73; Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610; Burbank v. Dennis, 101 Cal. 90; Munson v. Syracuse, Geneva & C. R. Co., 103 N. Y. 58; Limited Inv. Ass'n v. Glendale Inv. Ass'n, 99 Wis. 54; Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221; In re Cape Breton Co., 29 Ch. Div. 795; In re Ambrose Lake Tin & Copper Min. Co., 14 Ch. Div. 390.

See, also, Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate [1899] 2 Ch. 392.

It was also held in Erlanger v. New Sombrero Phosphate Co., supra, that such a suit by the corporation could not be defeated by showing that some of the shareholders were parties to the fraud, and would be benefited by the decree in favor of the corporation. "If the argument were once allowed to prevail," it was said, "it would only be necessary to corrupt one single shareholder to prevent a company from ever setting the contract aside. It may be said you give to the shareholder, who was a party to the fraud, a profit, because he will take it in respect of his shares, and since as between co-conspirators there is no contribution, therefore his brother conspirators, who are made liable for the fraud, cannot make him repay his proportion. But the doctrine of this court has never been to hold its hand and avoid doing justice in favor of the innocent, because it cannot apportion the punishment fully amongst the guilty." 5 Ch. Div. 73, 114, per Sir George Jessel, Master of the Rolls. See, also, Exter v. Sawyer, 146 Mo. 302, in which this decision was followed.

Laches on the part of the corporation may defeat such a suit. See Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, affirming 5 Ch. Div. 73.

Such a suit cannot be maintained when the corporation is unable to restore what it has received, unless its inability to do so is due to the fault of the promoter. See Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 145; Phosphate Sewage Co. v. Hartmont, 5 Ch. Div. 394; In re Cape Briton Co., 29 Ch. Div. 795. See, as to the qualification, Head v. Tattersall, L. R. 7 Exch. 7.

[110] Bagnall v. Carlton, 6 Ch. Div. 371; Emma Silver Min. Co. v. Grant, 11 Ch. Div. 918; In re Cape Briton Co., 26 Ch. Div. 221; Lydney & W. Iron Ore Co. v. Bird, 33 Ch. Div. 85; Pittsburgh Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149; Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78, 2 Keener's Cas. 1903, 56 N. J. Eq. 411, 58 N. J. Eq. 556; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 42 Am. St. Rep. 159; Chandler v. Bacon, 30 Fed. 538; South Joplin Land Co. v. Case, 104 Mo. 572; Burbank v. Dennis, 101 Cal. 90; McElhenny's Appeal, 61 Pa. St. 188; Fountain Spring Park Co. v. Roberts, 92 Wis. 345; Colton Improve-

cover the same,[111] or an action for damages.[112] Or a suit to recover such profits may be maintained by a receiver of the corporation.[113]

If the injury from the fraud of promoters of a corporation is to the corporate body, representing the stockholders collectively, and not to the stockholders individually, an action against the promoters to recover damages for the fraud, or to compel an accounting for secret profits, should be brought by the corporation, and not by the stockholders individually.[114] But a stock-

ment Co. v. Richter, 26 Misc. Rep. (N. Y.) 26; Hayward v. Leeson, 176 Mass. 310.

Laches on the part of the corporation may bar a suit against promoters to recover secret profits fraudulently made by them; but before it can be chargeable with laches, it must have knowledge of the fraud. Bagnall v. Carlton, 6 Ch. Div. 371.

Where the promoters of a corporation, after its creation, and while they were the sole stockholders, voted to issue its stock to themselves in payment for services rendered in securing options on land, which they assigned to the corporation, the stock so issued being equal to the estimated profits to be derived from such options, and afterwards invited the public to subscribe to the stock, without disclosing such facts, it was held that they were guilty of a fraud, and that the company could, without returning the lands acquired under the options, maintain an action to recover such stock, or damages for the loss thereof. Hayward v. Leeson, 176 Mass. 310.

Where the promoters of a corporation fraudulently procure the issue of stock to them in payment of secret profits made in the sale of property owned by them to the corporation, they may be compelled to account to the corporation for the shares so received, with all dividends received thereon, or the proceeds of a sale thereof, if sold by them, with interest from the date of the sale, or for the fair market value of the stock at the time of its issuance, or, if it had no market value at that time because the corporation was not yet launched, then the value at the time a market value may be found to have been established. Hayward v. Leeson, 176 Mass. 310.

Where shares in a corporation are offered to and taken by the public, and a prospectus is issued by the promoters which misrepresents or conceals material facts with regard to a contract for the purchase of property entered into by the corporation with its promoters, the corporation may sue to rescind the contract, notwithstanding the fact that the directors, who are the nominees of the promoters, may have been aware of the real facts of the case, and no fraud is imputable to them, for the directors would have no power to release the promoters from the consequences of their acts in promoting the company. Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 Ch. 392, distinguishing Salomon v. Salomon & Co., [1897] App. Cas. 22.

[111] Simons v. Vulcan Oil & Min. Co., 61 Pa. St. 202, 100 Am. Dec. 628.

[112] See Getty v. Devlin, 54 N. Y. 403, 70 N. Y. 504.

[113] Chandler v. Bacon, 30 Fed. 538. Compare Hayward v. Leeson, 176 Mass. 310.

[114] McAleer v. McMurray, 6 Phila. (Pa.) 244. See post, §§ 537, 538, 543.

holder may sue in equity if the corporation is in the control of the promoters, or if the officers fraudulently refuse to bring the suit.[115]

Individual corporators may maintain actions against a promoter of a corporation to recover a proportionate share of secret profits fraudulently made by him.[116] And if the promoter has been guilty of false and fraudulent representations in the prospectus or otherwise, any corporator who has been thereby induced to invest in the enterprise may maintain an action of deceit to recover damages sustained by him.[117]

A subscriber may rescind his subscription, and recover what he has paid thereon, if the corporation was a party to the fraud, but not otherwise.[118]

(d) Waiver of fraud—Compromise.—When a fraud is practiced upon the stockholders of a corporation by the promoters, it may be waived by the stockholders, but not by the directors. Knowledge of the fraud on the part of the directors is not

[115] Burbank v. Dennis, 101 Cal. 90; Exter v. Sawyer, 146 Mo. 302. See post, §§ 541, 542.

[116] Emery v. Parrott, 107 Mass. 95; Franey v. Warner, 96 Wis. 222; Brewster v. Hatch, 10 Abb. N. C. (N. Y.) 400, 122 N. Y. 349, 19 Am. St. Rep. 498; Getty v. Devlin, 54 N. Y. 403, 70 N. Y. 504.

[117] Getty v. Devlin, 54 N. Y. 403, 70 N. Y. 504; Brewster v. Hatch, 10 Abb. N. C. (N. Y.) 400, 122 N. Y. 349, 19 Am. St. Rep. 498; Gebhard v. Bates, 2 El. & Bl. 476; Hornblower v. Crandall, 7 Mo. App. 220, 78 Mo. 581; Paddock v. Fletcher, 42 Vt. 389.

A person who projects a joint-stock company, and causes books to be opened, and allows an inscription of a person as owner of an interest to a definite amount, which is false within his knowledge, and embodies such false statement in a certificate signed by himself, accompanying such certificate with a written power authorizing a transfer by the party to whom it is given, and by such representation induces innocent parties to advance money thereon, is liable in damages in an action for deceit, brought by an innocent party who purchased shares of stock on the faith of such representations. Cross v. Sackett, 6 Abb. Pr. (N. Y.) 247.

[118] Franey v. Warner, 96 Wis. 222. See In re Metropolitan Coal Consumers' Ass'n [1892] 3 Ch. 1; Kent v. Freehold Land & Brickmaking Co., L. R. 4 Eq. 588. And see post, § 470.

Where the promoters of a corporation to buy land as an investment have already acquired the privilege of buying the land at a lower figure than that represented to their associates, and after the formation of the corporation procure a conveyance to the corporation, and fraudulently appropriate the difference between the actual and the ostensible prices, an innocent subscriber to the stock of the corporation cannot tender his stock to them and recover from them the amount paid on it, since he cannot place them in their former position, because of the fact that the land has been conveyed to the corporation, and thereby placed beyond his control. Franey v. Warner, 96 Wis. 222.

knowledge on the part of the stockholders, and the fraud cannot be ratified or waived by the directors so as to bind the corporation or the stockholders.[119]

A compromise between a corporation and its promoters is binding.[120]

(e) Action by promoter to recover secret profits.—The well-settled principle that any agreement which contemplates the commission of a fraud upon the rights of others, or a breach of trust and confidence, is contrary to public policy and illegal, applies to agreements under which a promoter of a corporation is to commit a fraud by receiving secret profits from transactions with the corporation. Such an agreement is illegal, and he cannot maintain an action thereon. It has been held, for example, that a secret agreement between a promoter of a corporation and the owner of property, by which the property is to be sold to the corporation when formed, and the owner is to pay the promoter a certain amount of the price received, since it contemplates a fraud upon the corporation and the persons afterwards taking shares therein, is contrary to public policy and illegal, and, when the property is sold to the corporation in pursuance of the arrangement, the promoter cannot maintain an action against the vendor to recover his share of the proceeds.[121]

(f) Liability of promoters to subscribers on failure to organize corporation.—Promoters of a proposed corporation, who receive money from subscribers to its stock as a deposit or preliminary payment on their subscriptions, are liable to the latter therefor, in an action on implied assumpsit, if they fail to organize the corporation, unless it appears that there was an understanding to the contrary; and it can make no difference that they have paid out the money for expenses preliminary to organiza-

[119] Burbank v. Dennis, 101 Cal. 90; Simons v. Vulcan Oil & Min. Co., 61 Pa. St. 221, 100 Am. Dec. 628.

[120] Coburn v. Cedar Valley Land & Cattle Co., 138 U. S. 196.

[121] Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 42 Am. St. Rep. 159. A secret agreement between the directors and promoters of a corporation, by which the promoters are to receive a share of the profits before any dividends are paid, is a fraud upon the stockholders, and invalid. Dillon v. Commercial Cable Co., 87 Hun (N. Y.) 444.

tion.[122] There is no such liability, however, in the absence of fraud on the part of the promoters, if the money was paid with the understanding that it should be applied to expenses in procuring incorporation, and that the subscribers paying the same did so merely for the purpose of furthering the scheme.[123]

§ 111. Grants and conveyances—Title to property.

(a) In general.—As was stated in a former section,[124] persons cannot act as a corporation until they have become incorporated, at least *de facto.* Until a corporation is organized as authorized by its charter, "there is not a corporation, nor does it possess franchises or faculties for it or others to exercise, until it acquires a complete existence. By its birth, so to speak, it for the first time acquires its faculties to transact its business and perform its functions." [125]

It follows from this that the title to land cannot vest in a body as a corporation under a grant or conveyance until it has acquired a corporate existence. It was said in a New Jersey case: "There must be a person, either natural or artificial, *in esse,* to receive a conveyance of an immediate estate in land.

[122] Nockells v. Crosby, 3 Barn. & C. 814, 5 Dowl. & R. 751. See, also, Walstab v. Spottiswoode, 15 Mees. & W. 501; Ward v. Londesborough, 12 C. B. 252; Chaplin v. Clarke, 4 Exch. 403; Ashpitel v. Sercombe, 5 Exch. 147; Willey v. Parratt, 3 Exch. 211; Atkinson v. Pocock, 1 Exch. 796; Vane v. Cobbold, 1 Exch. 798; Bradford v. Harris, 77 Md. 153; Manistee Lumber Co. v. Union Nat. Bank of Chicago, 143 Ill. 490; Fitzwilliams v. Travis, 65 Ill. App. 183. Compare Williams v. Salmond, 2 Kay & J. 463.

Where a person advances money for stock in a corporation to be formed, the money must be refunded unless the corporation is organized within a reasonable time. And in an action to recover the money on failure to organize the corporation, it is no defense that it has been expended in the development of patents for the manufacture of articles under which the corporation was to be formed, and for other expenses towards its formation. Hudson v. West, 189 Pa. St. 491.

In order to hold the promoters of a projected corporation liable for money paid on subscriptions after failure to incorporate, it must be shown that the person who received the money was authorized to receive it for them, or for the corporation, and that he did so receive it. Fitzwilliams v. Travis, 65 Ill. App. 183.

[123] Garwood v. Ede, 1 Exch. 264; Watts v. Salter, 10 C. B. 477; Clements v. Todd, 1 Exch. 268; Jones v. Harrison, 2 Exch. 52, 12 Jur. 122; Willey v. Parratt, 3 Exch. 211. See, also, Watson v. Charlemont, 12 Q. B. 856.

[124] Ante, § 100.

[125] Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652.

An unincorporated association or community is not competent to purchase, or to take title to land by deed. Capacity to take title must exist before a valid conveyance can be made.[126]

It has been held, however, that a deed to a corporation, dated and executed before its organization, but accepted and recorded after its organization, is valid and vests the title in the corporation.[127] And a deed to a corporation may be dated and executed before its incorporation, and delivered in escrow, to be delivered to the corporation when created. This was decided in a well-considered West Virginia case, in which, after the corporators had signed an agreement to become a corporation, and before they had obtained a charter, a deed conveying land to such corporation was signed and acknowledged by the grantor and delivered to a third person, with directions to retain it until the corporation should be organized, and then deliver it to the corporation. It was held that when the corporation was organized, and the deed was delivered to and accepted by it, the deed operated as a valid conveyance.[128]

——**Personal property** cannot, any more than real property, be transferred to a corporation, so as to vest the title in it, before it has become incorporated.[129] But it does not follow that the title will not vest in the corporation when it is subsequently organized and accepts the property. If property is delivered to a person for a corporation before its organization, and it takes possession after its organization, its title is good. Thus, it has been held that, where money or personal property is paid or delivered upon subscriptions to the capital stock of a corporation before it is incorporated, the title to such money or prop-

[126] African M. E. Church v. Conover, 27 N. J. Eq. 158. See, also, Spring Garden Bank v. Hulings Lumber Co., 32 W. Va. 357.

A lease cannot be made to a corporation until it acquires its corporate existence. Utah Optical Co. v. Keith (Utah) 56 Pac. 155.

In some states, statutes have been enacted rendering valid and binding conveyance made to a prospective corporation in contemplation of its organization. See Cumberland Land Co. v. Daniel (Tenn. Ch. App.) 52 S. W. 446.

[127] Rotch's Wharf Co. v. Judd, 108 Mass. 224. And see Sayward v. Gardner, 5 Wash. 247.

[128] Spring Garden Bank v. Hulings Lumber Co., 32 W. Va. 357.

[129] See Jones v. Aspen Hardware Co., 21 Colo. 263.

erty vests in the corporation when it is subsequently created, without any formal transfer.[130]

——**Estoppel to deny corporate existence.**—As we have seen in a former chapter, a person who executes a conveyance to an association as a corporation, or a person claiming under him, is estopped to attack the validity of the conveyance on the ground that the corporation had not been legally organized at the time the conveyance was executed and delivered. It has been held, therefore, that a deed made to an association as a corporation before it has been organized inures to its use after its organization by way of estoppel against the grantor.[131]

——**De facto corporations.**—We have also seen that, when a corporation has been so far organized as to become a corporation *de facto,* it has the same capacity to take a conveyance of land as a corporation *de jure,* since its existence and capacity to take a conveyance cannot be collaterally attacked.[132]

——**Nonperformance of conditions subsequent.**—The validity of a conveyance to a corporation after it has been created is not affected by the fact that it has not performed conditions subsequent, or by the fact that it is not yet ready to transact the business for which it was created. Thus, where letters patent were issued to a corporation by the governor under a statute, and a conveyance was afterwards made to it, it was held that the conveyance was valid and vested the title in the corporation, an acceptance of the charter being presumed, although the corporation had not yet been organized by the election of officers.[133]

(b) Conveyance in trust for corporation.—There is nothing to prevent the owner of property from conveying it to a person in trust to convey to a corporation when organized, and, when the corporation is organized, it may compel the trustee to convey to it in accordance with the terms of the trust deed. Where property was conveyed by individuals to a trustee, in trust to

[130] American Silk Works v. Salomon, 4 Hun (N. Y.) 135.

[131] Dyer v. Rich, 1 Metc. (Mass.) 180. See, also, Broadwell v. Merritt, 87 Mo. 95. And see ante, § 85.

[132] Ante, § 81(d).

[133] Rathbone v. Tioga Nav. Co., 2 Watts & S. (Pa.) 74. See ante, § 100.

hold the same for the benefit of the individuals until the organization of a certain corporation, and then to convey the same to the corporation, it was held that a parol agreement between the individuals and the trustee that they and the corporation, when formed, would pay the trustee a certain amount for his services, was not binding upon the corporation, and that failure to make such payment was no ground for the trustee's refusal to convey to the corporation.[134]

(c) Vendor as trustee for corporation.—If land is purchased by persons representing a voluntary association, for the common benefit of the persons composing the association, and the purchase money is paid, and possession of the land given, the vendor becomes a trustee for the purchasers, and, as they are the mere agents of the association, the moment the association is incorporated it has a right to a conveyance from the vendor, and may enforce such right in equity.[135]

(d) Grant of franchises.—A franchise may be granted by the state or a municipality to individuals in contemplation of their incorporation, or it may be granted to the corporation when it shall be formed. In the latter case, the franchise is in abeyance until the corporation is formed, and then vests in the corporation without any assignment by the individuals. Even when a franchise is granted to individuals, and they afterwards incorporate, the franchise may vest in the corporation by virtue of the articles of incorporation without any formal transfer.

In a California case, where a franchise was granted to an individual and his associates and assigns, with a provision in the act requiring their incorporation within a certain time, it was held that the grant was to the corporation, and not to the individuals, and that the franchise vested in the corporation by operation of law as soon as it was formed, without any assignment from the individuals.[136] In another case, where a street-railroad franchise was granted to two persons, who thereupon

[134] Hecla Consolidated Gold Min. Co. v. O'Neill, 19 N. Y. Supp. 592.

[135] African M. E. Church v. Conover, 27 N. J. Eq. 157.

[136] Spring Valley Water Works v. City & County of San Francisco, 22 Cal. 434.

organized a corporation for the express purpose of constructing and operating a railroad under the franchise, and so declared in the articles of incorporation, it was held that the franchise vested in the corporation without any assignment by the individuals.[137]

A grant of a franchise to a corporation by the state or by a municipality cannot take effect, so as to constitute a contract, and so as to be irrevocable, before the corporation has been legally created or organized.[138]

(e) Grants for charitable or public uses.—Land may be granted at common law for a charitable or public use before there is a grantee in existence competent to take the grant, and in the meantime the grant will be in abeyance. When a grant, therefore, is made to a corporation to be brought into existence by a future act of the legislature or by future acts of corporators, the grant is not void because of the nonexistence of the grantee, but it remains in abeyance until the corporation is created or organized, and then vests the title in the corporation. This principle was applied in an early case in the supreme court of the United States to a grant of land by congress for the use of a seminary of learning to be afterwards established, and which was not incorporated until two years later. It was held that the grant remained in abeyance until the seminary was incorporated, and then vested the title in the corporation.[139]

It was said, in substance, by Mr. Justice Story in the Dartmouth College Case: "When a corporation is to be brought into existence by some future acts of the corporators, the franchises remain in abeyance until such acts are done, and when the corporation is brought into life, the franchises instantaneously attach to it. There is no difference between the case of a grant of land or franchise to an existing corporation and a

[137] Santa Rosa City R. Co. v. Central St Ry. (Cal.) 38 Pac. 986.

[138] Aspen Water & Light Co. v. City of Aspen, 5 Colo. App. 12, where a grant of franchises by a city to an association as a corporation was held inoperative because the association had not complied with the law to such an extent as to acquire a corporate existence.

[139] Trustees of Vincennes University v. Indiana, 14 How. (U. S.) 268, 274.

grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is *in esse,* and the franchise and property become vested and executed in it, it is as much an executed contract as if its prior existence had been established for a century."[140]

(f) Effect of incorporation on title to property of corporators.—The mere incorporation of persons who own property, real or personal, does not vest the title to such property in the corporation, even though the object of the incorporation may be to have the corporation own and manage the property. The terms of the act of incorporation may be such that, when it is accepted by the corporators, it will operate to transfer the title to the corporation;[141] but, if this is not the case, a formal transfer from the corporators is necessary.[142] This question will be further considered in subsequent sections.[143]

§ 112. Incorporation of partnerships and other unincorporated associations.*

(a) In general.—When persons who have been doing business as a partnership become incorporated, the corporation and the former partnership are distinct in the law, and the rights and liabilities of the one are not the rights and liabilities of the other. And it can make no difference that the members of the corporation and those of the partnership are the same, or that the corporation is formed for the express purpose of continuing the business previously carried on by the firm.[144] The same is true when any other unincorporated association becomes incorporated.[145]

[140] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 691-693.

[141] Cloquitt v. Howard, 11 Ga. 556.

[142] Manahan v. Varnum, 11 Gray (Mass.) 405; Leffingwell v. Elliott, 8 Pick. (Mass.) 455, 19 Am. Dec. 343; Holland v. Cruft, 3 Gray (Mass.) 162, 173; Frank v. Drenkhahn, 76 Mo. 508; McLeary v. Dawson, 87 Tex. 524.

[143] See post, §§ 112(b), 113.

*As to the reorganization and consolidation of corporations, and succession generally, see post, §§ 335-363.

[144] Georgia Co. v. Castleberry, 43 Ga. 187. And see the other cases more specifically cited in notes following.

[145] See Frank v. Drenkhahn, 76 Mo. 508.

(b) Title to property—Conveyances and transfers.—It necessarily follows that the property of the partnership, real or personal, does not become the property of the corporation merely because of the fact that the members of the corporation and the partnership are the same, or because the corporation was formed for the purpose of carrying on the business of the partnership. It remains the property of the partners, and they must individually convey the same to the corporation to give it title,[146] unless the terms of the act or articles of incorporation are such as to transfer the title without any formal transfer by the parties.[147]

Of course, the partners may convey or assign the assets of the firm to the corporation,[148] provided the conveyance is not a fraud upon the firm creditors.[149] When the members of a partnership form a corporation, of which they are the only corporators, and convey to it the partnership assets, they have a right to agree upon the price each shall be allowed for his share, as such an agreement does not encroach upon the rights of any third person; and the validity of such an agreement will not be affected by the subsequent insolvency of the corporation.[150]

[146] Manahan v. Varnum, 11 Gray (Mass.) 405; Hennessy v. Griggs, 1 N. D. 52; Rau v. Union Paper Mill Co., 95 Ga. 208; Frank v. Drenkhahn, 76 Mo. 508; McLeary v. Dawson, 87 Tex. 524. See, also, Leffingwell v. Elliott, 8 Pick. (Mass.) 455, 19 Am. Dec. 343; Holland v. Cruft, 3 Gray (Mass.) 162, 173.

In Frank v. Drenkhahn, 76 Mo. 508, a conveyance was made to certain persons as directors of an unincorporated joint-stock company, and their successors in office, in special trust for the use of the shareholders in the company, and afterwards the company was incorporated under the same name. It was held, in the absence of any conveyance from the individuals to whom the property had been conveyed, that the corporation took no title to the property, and that it could not maintain ejectment therefor.

[147] See infra, this subdivision.

[148] Williams v. Colby, 6 N. Y. Supp. 459; Shufeldt v. Smith, 139 Mo. 367; and cases cited in notes following.

Where the three members of a firm agree that a corporation shall be formed, and that the firm property shall be conveyed to it, and stock issued to them in proportion to their respective contributions, they are all necessary parties to a transfer of the firm's property to the corporation when formed, but neither of them can avoid a transfer by the others, in which he has wrongfully refused to join. Hennessy v. Griggs, 1 N. D. 52.

[149] See infra, this section.

[150] See Pennsylvania Tack Works v. Sowers, 2 Walk. (Pa.) 416; Lottman Bros. Mfg. Co. v. Houston Waterworks Co. (Tex. Civ. App.) 38 S. W. 357.

——**Equitable title.**—The corporation may acquire an equitable title by a purchase from the partners, without any conveyance, if it takes possession and makes improvements. Where a firm became incorporated, the partners becoming the principal stockholders, and the corporation purchased the firm property, paid the purchase price, took possession, and made improvements, but received no deed from the partners, it was held that it acquired an equitable title, and that a mortgage by it was effectual, as between it and the mortgagee, to charge such title.[151]

——**Transfer of title by charter or articles of incorporation.**—A special act incorporating persons for the purpose of continuing a business formerly carried on by them as a partnership may by its express provisions, when accepted by them, vest in the corporation the property owned by the partnership, without any formal transfer;[152] but neither an act of incorporation nor a charter from the court or application therefor can do so as against a subsequent *bona fide* purchaser from the partners unless the description of the property is sufficiently certain to show what particular property is transferred.[153] And it would seem clear that the title to partnership real property cannot be vested in the corporation by the mere articles or certificate of incorporation, or by a charter from a court (as distinguished from a special legislative act of incorporation), when by statute a formal conveyance is necessary to pass the title to real property.[154]

[151] Cooke v. Watson, 30 N. J. Eq. 345.

[152] Colquitt v. Howard, 11 Ga. 556, as to which see post, § 113.

Where the members of a partnership and others obtained a charter of incorporation providing that the property of the partnership was thereby declared to be the property of the corporation upon the partnership executing to the corporation proper releases, it was held that the charter did not transfer title to the corporation without the execution of such releases. McLeary v. Dawson, 87 Tex. 524.

[153] Rau v. Union Paper Mill Co., 95 Ga. 208. In this case, a partnership obtained a charter incorporating them under the same name, and the petition for the charter referred to the property of the firm as capital stock, describing it generally as land, machinery, etc. It was held that a sale by a member of the firm of a portion of the land passed the title, and that it could not be subjected to the debts of the corporation.

[154] See Rau v. Union Paper Mill Co., 95 Ga. 208.

——**Estoppel.**—Cases may arise in which corporators may, by the terms of their articles of incorporation or of their application to the court for a charter, so far commit their property as assets of the corporation that if, upon its organization, the corporation takes possession and control of the property, and incurs debts upon the faith and credit thereof, the courts will treat the property, as to such debts, as the property of the corporation, not upon the theory that the corporation has the legal title, but upon the theory that the corporators are estopped to set up title in themselves as against a *bona fide* creditor upon the faith of their apparent dealings with the property.[155] This cannot be, however, where the contest is not between the corporators themselves and a person claiming to be a creditor of the corporation, but between a creditor of the corporation and a *bona fide* purchaser, without notice, from the corporators, since as against him there is no estoppel.[156]

——**Fraudulent conveyances.**—If a conveyance by partners to a corporation formed by them is a fraud upon the creditors of the firm, they may sue in equity to set the same aside and subject the property to the payment of their debts, or in some jurisdictions they may treat it as a nullity, and levy their executions upon the property as the property of the firm. Such a conveyance is governed by the same rules as other fraudulent conveyances.

In a leading New York case the members of an embarrassed partnership united in forming a corporation under the general law, and then transferred to it all the property of the partnership. Afterwards a judgment creditor of the partnership issued an execution on his judgment, and levied the same upon the property as the property of the firm, becoming the purchaser at the sale under the execution, and a judgment creditor of the corporation afterwards levied his execution upon the property as the property of the corporation. In an action by the partnership creditor against the corporation creditor for taking the

[155] Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511; Rau v. Union Paper Mill Co., 95 Ga. 208, 213.

[156] Rau v. Union Paper Mill Co., 95 Ga. 208, 213.

property, it was held that the question whether the corporation was formed by the members of the partnership, and the partnership property transferred to it, to hinder, delay, and defraud the partnership creditors, might be raised and submitted to the jury upon proper evidence; and that, if such was the case, the property was liable to be taken on execution as the property of the partnership.[157]

(c) Rights of corporation with respect to contracts of and debts due to partnership or association.—The incorporation of a partnership or other unincorporated association does not of itself give the corporation any right to enforce contracts made with the partnership or association, or to sue upon debts due to it.[158] The partnership or association, however, may assign its rights and claims to the corporation, if they are of an assignable nature, and the corporation may then sue thereon, like any other assignee, at common law in the name of the assignors, or in equity in its own name, or at law in its own name, where there is a statute allowing suits to be brought in his own name by the assignee of a chose in action.[159]

Where a corporation formed by and composed of the members of a partnership takes a transfer of a note from the partnership, it is not in the position of a *bona fide* purchaser, and the debtor, in an action thereon by the corporation, may interpose any defense or claim which he might have interposed in an action by the partnership.[160]

[157] Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372; ante, § 7, and cases there cited. And see works on fraudulent conveyances.

See, also, post, § 342(i).

[158] In Scots Charitable Soc. v. Shaw, 8 Mass. 532, under a statute incorporating a voluntary association, and authorizing the corporation to receive all moneys due to the association, and to receipt therefor, and providing that such receipts might be given in evidence in any action to recover the debt, it was held that receipts given by the corporation for money received by it on debts due to the association were valid discharges of such debts. It was not held, however, that the corporation could maintain actions against the debtors of the association, or that the corporation was not liable to the members of the association for the money collected by it, but the contrary was intimated.

[159] Griffin's Ex'r v. Macaulay's Adm'rs, 7 Grat. (Va.) 476, 583.

[160] McElwee Mfg. Co. v. Trowbridge, 62 Hun (N. Y.) 471.

Where partners engaged in negotiating loans formed a corporation to continue the business, and transferred to it a note given in

(d) Liability of corporation on debts or contracts of partnership or association.—Since a corporation formed by the members of a partnership to continue the business carried on by the firm is distinct from the partnership, it follows that the debts and contracts of the partnership do not become the debts and contracts of the corporation unless they are assumed by it, or unless there has been a fraudulent transfer of property to it by the partners.[161] To make the corporation liable for the debts of the partnership there must be an assumption thereof by the corporation, and such assumption must be based upon a sufficient consideration, just as there must be a consideration for any other promise by one person to answer for the debt of another.[162] There is a sufficient consideration if the corporation receives the assets of the firm.[163]

Where a corporation assumes the debts of a partnership theretofore carrying on the business, the fact that the partners afterwards give their notes for the indebtedness does not re-

renewal of a note given by a borrower for a loan procured by the partnership, it was held, in an action by the corporation on the note, that it was liable for usurious interest and commissions collected on the note by the partnership. Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 402.

[161] Georgia Co. v. Castleberry, 43 Ga. 187; Paxton v. Bacon Mill & Min. Co., 2 Nev. 257; Bradley Fertilizer Co. v. South Pub. Co., 17 N. Y. Supp. 587, reversing 14 N. Y. Supp. 917; Id., 4 Misc. Rep. 172, 23 N. Y. Supp. 675, reversing 21 N. Y. Supp. 472; Church v. Church Cementico Co., 75 Minn. 85; Durlacher v. Frazer (Wyo.) 55 Pac. 306; Austin v. Tecumseh Nat. Bank, 49 Neb. 412, 59 Am. St. Rep. 543; McLellan v. Detroit File Works, 56 Mich. 579.

On this point see the valuable note in 59 Am. St. Rep. 547-560. See, also, Dingeldein v. Third Ave. R. Co., 9 Bosw. (N. Y.) 79.

The fact that a corporation has paid other debts of its predecessor in business does not tend to show that it has assumed or promised to pay a particular debt. Church v. Church Cementico Co., 75 Minn. 85.

[162] Georgia Co. v. Castleberry, 43 Ga. 187.

[163] Waterman's Appeal, 26 Conn. 96. See, also, Williams v. Colby, 6 N. Y. Supp. 459; Hall v. Herter Bros., 90 Hun (N. Y.) 280, 157 N. Y. 694; Bremen Sav. Bank v. Branch-Crookes Saw Co., 104 Mo. 425; Shufeldt v. Smith, 139 Mo. 367; and cases cited in notes following.

In Waterman's Appeal, 26 Conn. 96, a firm which was largely indebted proposed to convey all their assets, which exceeded their liabilities, to a corporation to be formed, which should assume their indebtedness, and pay the same from the earnings of the property after paying certain preferred stock for new capital. A corporation was formed, and the property transferred, and at its first meeting the corporation passed a vote accepting the property and assuming the debts of the firm, in ac-

lieve the corporation from liability, so as to prevent a preference thereof by the corporation.[164]

——**Statute of frauds.**—Since the promise by the corporation to pay the debts of the partnership is a promise to answer for the debts of another, it has been held that it, or a memorandum thereof, must be in writing and signed by the party to be charged, as required by the statute of frauds.[165]

The circumstances, however, may be such as to take the case out of the operation of the statute of frauds. Thus, by the weight of authority the statute does not apply where there is a novation and the liability of the original debtor is extinguished;[166] or where the promissor receives property of the original debtor out of which to pay the debt, and this applies where a corporation receives all the property of a partnership and assumes payment of its debts. In such a case, the promise of the corporation is an original promise, based upon its receipt of the property.[167]

——**Presumption from receipt of assets of partnership.**—When a corporation formed by and consisting of the members of a partnership takes a conveyance or assignment of all the assets of the partnership for the purpose of continuing the business,

cordance with the agreement with the firm's creditors. It was held that the corporation, having the power to assume, on a valid consideration, the debts of the firm, did so by its votes and the acceptance of the property, and was liable for their payment.

Where a corporation, organized by the members of a partnership, passes a resolution to purchase the assets of the partnership, and assumes its indebtedness, it cannot, by a secret understanding between the trustees that certain claims are not included, prevent the creditor from following the firm's assets into the hands of the corporation. Williams v. Colby, 6 N. Y. Supp. 459.

As to the priority between debts contracted by the corporation and debts of the partnership assumed by it, upon the corporation's becoming insolvent and passing into the hands of a receiver, see Lamkin v. Baldwin & Lamkin Mfg. Co., 72 Conn. 57.

[164] Johnston v. Gumbel (Miss.) 19 So. 100.

[165] Georgia Co. v. Castleberry, 43 Ga. 187.

[166] See Goodman v. Chase, 1 Barn. & Ald. 297; Curtis v. Brown, 5 Cush. (Mass.) 488; Meriden Britannia Co. v. Zingsen, 48 N. Y. 247, 8 Am. Rep. 549; Teeters v. Lamborn, 43 Ohio St. 144.

[167] Calumet Paper Co. v. Stotts Investment Co., 96 Iowa, 147, 59 Am. St. Rep. 362. See Wait v. Wait's Ex'r, 28 Vt. 350; Ackley v. Parmenter, 98 N. Y. 425, 50 Am. Rep. 693; McCraith v. National Mohawk Valley Bank, 104 N. Y. 414.

See works on contracts, and on the statute of frauds.

it is to be presumed that it has assumed the partnership debts, and it is *prima facie* liable therefor.[168]

It has been held, however, that the taking of the property of a partnership by a corporation formed to continue its business is not an assumption of the debts of the partnership, where there are other stockholders than the original partners.[169]

——Running account—Application of payment—Mechanic's lien.—When a corporation formed by the members of a partnership assumes liability under a contract made by the partnership under which work has been done or materials furnished to the partnership, and under which work is continued or further materials furnished to the corporation, and makes a general payment on account, the creditor may apply the payment to such items as he may choose; and it can make no difference that a person who was not a member of the firm is a stockholder in the corporation.[170]

[168] Reed Bros. Co. v. First Nat. Bank of Weeping Water, 46 Neb. 168; Bremen Sav. Bank v. Branch-Crookes Saw Co., 104 Mo. 425; Haslett's Ex'rs v. Wotherspoon, 1 Strob. Eq. (S. C.) 209; Hall v. Herter Bros., 90 Hun (N. Y.) 280, 157 N. Y. 694; Williams v. Colby, 6 N. Y. Supp. 459; Andres v. Morgan, 62 Ohio St. 236.

Where a corporation succeeded a partnership in its business, and acquired all its assets, and retained an employe of the firm under a statement that he should continue under the old arrangement, with a contract then in hand, it was held that it should be inferred that the corporation assumed, under such contract, the obligations of the firm to the employe. Hall v. Herter Bros., 90 Hun (N. Y.) 280, 157 N. Y. 694. See, also, Burke v. Lincoln Valentine Co., 28 Misc. Rep. (N. Y.) 202.

[169] Paxton v. Bacon Mill & Min. Co., 2 Nev. 257. In this case, the proprietors of a mine contracted an indebtedness for the purpose of developing it. Afterwards, with others, they formed a corporation in which they owned three-fourths of the stock, and conveyed the mine to it for a valuable consideration. It was held that the corporation was not liable for the indebtedness without a promise to pay it. See, also, Durlacher v. Frazer (Wyo.) 55 Pac. 306.

In Dingeldein v. Third Ave. R. Co., 9 Bosw. (N. Y.) 79, a corporation was created to operate a railroad which had been carried on by an unincorporated association, and received a conveyance of the property of the association which was subject to a payment which the association had agreed to make to plaintiff for building a sewer, but which contained no covenant to pay it. The plaintiff continued the work with the knowledge of the corporation, and without any objection on its part. It was held that this was not alone enough to make the corporation liable for the work, but that there must have been a novation of the contract, or a new promise by the corporation.

[170] Allen v. Frumet Mining & Smelting Co., 73 Mo. 688.

It has been held, however, that in such a case there is not a continuing account beginning with the firm and ending with the corporation, so as to allow the creditor to file a single statement for a mechanic's lien, but that separate liens must be filed.[171]

(e) Liability of the partners on contracts and for debts.—When partners become incorporated they remain liable, of course, as partners, on all contracts and for all debts made or incurred while they were doing business as such, unless they are released from such liability.[172] And by the weight of authority, partners who, intending to form a corporation, subscribe for stock, establish the business, and appoint a superintendent, are liable as partners on a contract made by him before they signed articles of association,[173] unless the other party is estopped by reason of contracting with them as a corporation.[174]

They may also be liable as partners upon a contract made after they have become incorporated, if the other party enters into the contract without notice of their incorporation. Thus, when partners have dealt as such with a seller of goods, and, after becoming incorporated, continue to deal as before, having their bills made in the same way, without giving any notice of their altered condition, they will continue to be liable as partners, unless the seller has actual knowledge thereof derived from some other source.[175]

(f) Dissolution of the partnership.—When partners agree to form a corporation, and that all the assets of the partnership shall be assigned to the corporation, and that the capital stock of the corporation shall be divided among them in the same

[171] Allen v. Frumet Mining & Smelting Co., 73 Mo. 688.

[172] This is true, even though the other party to the contract may have known that the partnership articles provided for incorporation. Witmer v. Schlatter, 2 Rawle (Pa.) 359.

If the debt is assumed by the corporation, and the partners released, the latter cannot afterwards be held liable. See Whitwell v. Warner, 20 Vt. 425, where a creditor of a partnership allowed his account to be transferred to the corporation, and then continued a long running account with the corporation.

[173] Martin v. Fewell, 79 Mo. 401; ante, § 78, and cases there cited.

[174] Ante, § 84(g).

[175] Martin v. Fewell, 79 Mo. 401. See, also, Johns v. Brown, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 1016.

proportion as the capital of the partnership, the organization of the corporation, as agreed, dissolves the partnership, and neither of the parties, after he has assisted and acquiesced in the formation of the corporation, can be heard to say that it is not in accordance with the agreement.[176]

(g) Right of partners inter se and against the corporation.—When partners organize a corporation, their rights and remedies *inter se* and as against the corporation depend, of course, upon the terms of their agreement in forming the corporation, or their contract with the corporation when formed. If the corporation excludes a member from any share in its management in violation of his rights, after having received his share of the partnership assets, he may maintain an action against it for damages or for an accounting.[177]

§ 113. Incorporation of tenants in common.

A statute incorporating the tenants in common of property —as of a wharf, for example—and their heirs and assigns, although upon their own petition, and for the purpose of enabling them the better to manage and improve the property, does not vest the title to the property in the corporation, unless such an intention clearly appears, but a conveyance from the individuals to the corporation is necessary.[178]

The terms of the act, however, may be such as to show an intention to vest the property in the corporation without any

[176] Hennessy v. Griggs, 1 N. D. 52.

[177] In Crosby Lumber Co. v. Smith, 3 U. S. App. 125, 51 Fed. 63, the plaintiff and others formed a partnership, to which the plaintiff contributed a large part of the capital in the form of real and personal property. Afterwards it was agreed to form a corporation, the partners to take stock therein to the full amount of their interest in the firm, as such interest should appear on a certain date. A dispute afterwards arose as to the amount of the plaintiff's interest, and the corporation declared his interest in the concern forfeited, and excluded him from any share in its management. He then brought an action for damages, which, on the trial, took the form of an accounting as to his interest. It was held that he was entitled to recover the value of his interest at the time it was taken from him, and that, in computing the same, there should be included, not only the technical profits, but also the increase in value of the assets of the concern.

[178] Leffingwell v. Elliott, 8 Pick. (Mass.) 455, 19 Am. Dec. 343; Holland v. Cruft, 3 Gray (Mass.) 162, 173. And see Manahan v. Varnum, 11 Gray (Mass.) 405.

formal transfer from the corporators, and, if this is so, the act will have such effect. In a Georgia case, where persons owning lands as tenants in common were incorporated by a special act for the express purpose of improving and *selling* the lands, and the charter was accepted, it was held that the title to the lands vested in the corporation by virtue of the charter and its acceptance, and that the corporation, and not the individuals, must afterwards sue to enjoin a trespass on the same. As the corporation was created for the purpose of selling the lands, and was authorized by the act to sell the same, and as it could not do so without title thereto, it was considered that the intention was to vest the title in it without any other transfer.[179]

[179] Colquitt v. Howard, 11 Ga. 566.

CHAPTER VI.

CITIZENSHIP AND RESIDENCE OR DOMICILE OF CORPORATIONS.

§ 114. In general.
115. Citizenship in general.
116. Residence or domicile in general.
117. Corporations under the laws of different states.
118. Effect of doing business in another state.
119. Distinction between license and charter from another state.
120. Corporations created by congress.
121. Territorial corporations.
122. Residence or domicile within the state.

§ 114. In general.—In a sense, and for some purposes, a corporation may be regarded as a citizen, resident, or inhabitant. For such purposes it is a citizen, resident, or inhabitant of the country or state by or under whose laws it was created; and it can make no difference that some or even all of its stockholders or members are citizens or residents of some other country or state, or that it is doing business through its agents in some other country or state.

As a rule, the domicile of a corporation within a state is at the place where it has its principal office or place of business.

As was shown in a former chapter, a corporation, since it is an artificial person in the law, may, in a sense, be a "citizen," "resident," or "inhabitant," within the meaning of a statute.[1] It may be so, for example, within the meaning of statutes defining the jurisdiction of courts, such as the act of congress giving the federal courts jurisdiction of suits between citizens of different states, and the statute of a state requiring actions to be brought in the county or city in which the plaintiff or the defendant may reside. Or it may have a residence, within the meaning of statutes relating to taxation, and various other statutes. It is often important, therefore, to determine the state

[1] Ante, § 23 et seq.

or country of which a particular corporation is to be regarded as a citizen or resident.

The settled doctrine is that a corporation, for the purposes for which it may be considered a citizen, resident, or inhabitant, is a citizen, resident, or inhabitant of the country or state by or under whose laws it was created or organized, and that it cannot be a citizen, resident, or inhabitant of any other country or state; and that it can make no difference whatever, in the application of this doctrine, that the members or stockholders of the corporation are citizens and residents of some other country or state than that to whose laws it owes its existence, or that the corporation is engaged in business in some other country or state with its express or implied consent.[2]

The reason for this doctrine is that a corporation is purely a creature of the law, and that, since the laws of a country or state can have no operation beyond its territorial limits, corporations which are created by those laws can have no existence beyond such limits. As was said by Chief Justice Marshall in a leading case in the supreme court of the United States: "A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."[3]

§ 115. Citizenship in general.

The constitution of the United States and acts of congress in pursuance thereof give the federal courts jurisdiction of actions between citizens of different states. In construing the constitution and these acts of congress, and applying them to actions by or against corporations, the supreme court of the United States has held, *in effect*, that a corporation is to be regarded as a citizen of the state by or under whose laws it is created, and

[2] See the cases cited in the notes following.

[3] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519.

that no averment or proof of the citizenship of its members elsewhere will be permitted. And the principle applies in any other case in which it is necessary to determine the citizenship of a corporation.[4]

It has been said that, strictly speaking, a corporation cannot be a citizen of any state, but that for the purposes of federal jurisdiction all the members of a corporation are conclusively presumed to be citizens of the state to whose laws it owes its existence.[5] There is no reason or necessity, however, for this splitting of hairs. As we have seen, an action by or against a corporation is not in any sense an action by or against its members, but is an action by or against the corporation as an artificial person having a legal entity entirely separate and distinct from its members.[6] And there is no reason why it cannot properly be said that a corporation itself is a "citizen," not in the strict sense of the term, but within the meaning of statutes defining the jurisdiction of courts. In an English case a British corporation was held to be a "British subject," within the meaning of a statute allowing the registration of vessels owned entirely by British subjects, although its members were foreigners.[7] And in one of the cases in the supreme court of the Uni-

[4] Baltimore & Ohio R. Co. v. Harris, 12 Wall. (U. S.) 65, 1 Cum. Cas. 46; Ohio & Mississippi R. Co. v. Wheeler, 1 Black (U. S.) 286; Louisville, Cincinnati & C. R. Co. v. Leston, 2 How. (U. S.) 497; Chicago & Northwestern Ry. Co. v. Whitton's Adm'r, 13 Wall. (U. S.) 270; Muller v. Dows, 94 U. S. 444, 1 Cum. Cas. 53; Barron v. Burnside, 121 U. S. 186; Shaw v. Quincy Min. Co., 145 U. S. 444, 2 Cum. Cas. 55; Stout v. Sioux City & Pac. R. Co., 3 McCrary (U. S.) 1, 8 Fed. 794, 1 Cum. Cas. 61; Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325, 344; Herryford v. Aetna Ins. Co., 42 Mo. 148; Horne v. Boston & Maine Railroad, 62 N. H. 454; Fisk v. Chicago, Rock Island & P. R. Co., 53 Barb. (N. Y.) 472; Kranshaar v. New Haven Steamboat Co., 7 Rob. (N. Y.) 356; Rece v. Newport News & Mississippi Valley R. Co., 32 W. Va. 164.

See, also, St. Louis & San Francisco R. Co. v. James, 161 U. S. 545; Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552; Duncan v. St. Louis, I. M. & S. R. Co., 49 La. Ann. 1700; Wilson v. Triumph Consolidated Mining Co., 19 Utah, 66, 75 Am. St. Rep. 718; Mobile & O. R. Co. v. Barnhill, 91 Tenn. 395, 30 Am. St. Rep. 889; Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 61 Am. St. Rep. 756.

[5] Muller v. Dows, 94 U. S. 444, 1 Cum. Cas. 53; Bank of United States v. Deveaux, 5 Cranch (U. S.) 61, 1 Smith's Cas. 58; Marshall v. Baltimore & Ohio R. Co., 16 How. (U. S.) 327, 1 Smith's Cas. 62.

[6] Ante, §§ 5, 6.

[7] Reg. v. Arnaud, 16 Law J. Q.

ted States it was expressly said that a corporation "is to be regarded as if it were a citizen of the state where it was created."[8]

§ 116. Residence or domicile in general.

A corporation is not only a "citizen" for some purposes, as explained above, but it is also a "resident" or "inhabitant" for many purposes.[9] It is a resident or inhabitant,—or, in other words, it has its legal domicile,—in the country or state by or under whose laws it was created, and in that country or state only, although it may be engaged in business and have an office in another country or state.[10] This is true, for example, under the act of congress requiring suits in the federal courts to be brought in the district of which the defendant is an inhabitant.[11] In like manner, the domicile of a corporation with respect to debts due by it is in the state of its creation.[12] And the place of its creation determines the residence of a corporation for the purposes of the attachment laws.[13]

§ 117. Corporations under the laws of different states.

Corporations like railroad companies, bridge companies, and

B. 50, 1 Keener's Cas. 28, 1 Cum. Cas. 30.

[8] Baltimore & Ohio R. Co. v. Harris, 12 Wall. (U. S.) 65, 1 Cum. Cas. 46.

[9] Ante, § 25.

[10] Shaw v. Quincy Min. Co., 145 U. S. 444, 2 Cum. Cas. 5; Equitable Life Assur. Soc. v. Vogel's Ex'r, 76 Ala. 441, 52 Am. Rep. 344; Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325; Barbour v. Paige Hotel Co., 2 App. D. C. 174; Baltimore & Ohio R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 688; Chafee v. Fourth Nat. Bank of New York, 71 Me. 514, 36 Am. Rep. 345; City of St. Louis v. Wiggins Ferry Co., 40 Mo. 580; Herryford v. Aetna Ins. Co., 42 Mo. 148; Merrick v. Van Santvoord, 34 N. Y. 208; Evans v. Monat, 4 Jones Eq. (N. C.) 227; Covington & Cincinnati Bridge Co. v. Mayer, 31 Ohio St. 317; Rece v. Newport News & Mississippi Valley R. Co., 32 W. Va. 164; Douglass v. Phenix Ins. Co. of Brooklyn, 138 N. Y. 209, 34 Am. St. Rep. 448; Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 61 Am. St. Rep. 756.

[11] Shaw v. Quincy Min. Co., 145 U. S. 444, 2 Cum. Cas. 5; In re Keasbey & Mattison Co., 160 U. S. 221; Day v. Newark India Rubber Mfg. Co., 1 Blatchf. 628, Fed. Cas. No. 3,685; Myers v. Door, 13 Blatchf. 22, Fed. Cas. No. 9,988; Miller v. Wheeler & Wilson Mfg. Co., 46 Fed. 882; Donnelly v. United States Cordage Co., 66 Fed. 613; Gorham Mfg. Co. v. Watson, 74 Fed. 418.

[12] Equitable Life Assur. Soc. v. Vogel's Ex'r, 76 Ala. 441, 52 Am. Rep. 344.

[13] Barbour v. Paige Hotel Co., 2 App. D. C. 174; Harley v. Charleston Steam-Packet Co., 2 Miles (Pa.) 249.

the like, created by or under the laws of different states, may have the same name and the same powers, and be under the management of the same directors and officers, so as to be regarded in popular understanding, and so as to conduct their operations, as if they were one corporation. In the law, however, they are not one corporation, but several and distinct corporations, and each is a citizen and resident or inhabitant of the state by or under whose laws it was created. Where one state creates a corporation for the purpose of conducting operations within its limits, and also within the limits of an adjoining state, the other state may also create a corporation with the same members or stockholders, the same name and powers, and the same management; but since a corporation is purely a creature of the law, and since the laws of a state can have no extraterritorial operation, two states cannot *jointly* create a single corporation.

It was said in a late case in the circuit court of appeals: "It must be regarded as settled beyond doubt or controversy that two states of this Union cannot by their joint action create a corporation which will be regarded as a single corporate entity and, for jurisdictional purposes, a citizen of each state which joined in creating it. One state may create a corporation of a given name, and the legislature of an adjoining state may declare that the same legal entity shall be or become a corporation of that state as well, and be entitled to exercise within its borders, by the same board of directors and officers, all of its corporate functions. Nevertheless, the result of such legislation is not to create a single corporation, but two corporations of the same name having a different paternity." And in each state there is a corporation which is a citizen of that state.[14]

[14] Missouri Pac. Ry. Co. v. Meeh, 32 U. S. App. 691, 69 Fed. 753. See, also, Ohio & Mississippi R. Co. v. Wheeler, 1 Black (U. S.) 286; Muller v. Dows, 94 U. S. 444, 1 Cum. Cas. 53; Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 136 U. S. 356, 1 Keener's Cas. 118; Stout v. Sioux City & P. R. Co., 3 McCrary (U. S.) 1, 8 Fed. 794, 1 Cum. Cas. 61; Fitzgerald v. Missouri Pac. Ry. Co., 45 Fed. 812; Louisville Trust Co. v. Louisville, New Albany & C. R. Co., 75 Fed. 433; Copeland v. Memphis & Charleston R. Co., 3 Woods, 651, Fed. Cas. No. 3,209; Blackburn v. Selma, Marion & M. R. Co., 2 Flip. 525, Fed. Cas. No. 1,467; Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325; Bishop v. Brainard, 28 Conn. 289; Racine & Mississippi R.

Consolidation.—This principle also applies when the legislatures of two or more states undertake to consolidate corporations created by them respectively, as railroad companies or bridge companies. The result is several distinct corporations, for, as was said in an Illinois case, the legislatures of two states "have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state."[15]

In a Michigan case it was said by Judge Cooley: "It is impossible to conceive of one joint act, performed simultaneously by two sovereign states, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but when the two unite they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."[16]

§ 118. Effect of doing business in another state.

As we shall see in treating of foreign corporations, corporations created by or under the laws of one state, while they can "live and have their being in that state only," may, by their

Co. v. Farmers' Loan & Trust Co., 49 Ill. 331, 95 Am. Dec. 595; Quincy Railroad Bridge Co. v. Adams County, 88 Ill. 615, 1 Keener's Cas. 105; Horne v. Boston & Maine Railroad, 62 N. H. 454; Chicago & Northwestern Ry. Co. v. Auditor General, 53 Mich. 91; Allegheny County v. Cleveland & Pittsburg R. Co., 51 Pa. St. 228, 88 Am. Dec. 579; Baltimore & Ohio R. Co. v. Gallahue's Adm'rs, 12 Grat. (Va.) 655, 65 Am. Dec. 254; Covington & C. Bridge Co. v. Mayer, 31 Ohio St. 317; Rece v. Newport News & Mississippi Valley R. Co., 32 W. Va. 164.

See, also, Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552; Mobile & O. R. Co. v. Barnhill, 91 Tenn. 395, 30 Am. St. Rep. 889; Georgia & A. R. Co. v. Stollenwerck (Ala.) 25 South. 258.

[15] Quincy Railroad Bridge Co. v. Adams County, 88 Ill. 615, 1 Keener's Cas. 105.

[16] Chicago & Northwestern Ry. Co. v. Auditor General, 53 Mich. 91; Duncan v. St. Louis, Iron Moun-

duly-authorized agents, have an office, engage in business, take and hold property, and make contracts in another state with its express or implied consent.[17] By doing so, however, they do not become in any sense citizens, residents, or inhabitants of the latter state, within the meaning of a statute defining the jurisdiction of courts, or other statutes, any more than a natural person, being a citizen of and residing in one state, would become a citizen or resident of another state by doing business therein through an agent. They remain citizens, residents, or inhabitants of the state of their creation, and of that state only.[18] "By doing business away from their legal residence they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad."[19]

"Found."—It has been held, however, that a corporation of

tain & S. R. Co., 49 La. Ann. 1700. See, also, post, § 362.

[17] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; post, § 131(b), et seq. and chapter xxvi.

[18] Baltimore & Ohio R. Co. v. Koontz, 104 U. S. 5; Shaw v. Quincy Min. Co., 145 U. S. 444, 2 Cum. Cas. 5; Southern Pac. R. Co. v. Denton, 146 U. S. 202; In re Keasbey & Mattison Co., 160 U. S. 221; Filli v. Delaware, Lackawanna & W. R. Co., 37 Fed. 65; Chafee v. Fourth Nat. Bank of New York, 71 Me. 514, 36 Am. Rep. 345; Baltimore & Ohio R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 688; Herryford v. Aetna Ins. Co., 42 Mo. 148; Kranshaar v. New Haven Steamboat Co., 7 Rob. (N. Y.) 356; Evans v. Monat, 4 Jones Eq. (N. C.) 227.

See, also, St. Louis & San Francisco R. Co. v. James, 161 U. S. 545; Louisville, N. A. & C. R. Co., 174 U. S. 552; Douglass v. Phenix Ins. Co. of Brooklyn, 138 N. Y. 209, 34 Am. St. Rep. 448; Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 61 Am. St. Rep. 756.

Thus, a railroad company created under the laws of one state does not become a citizen of another state, for the purposes of federal jurisdiction, by leasing and operating a railroad in the other state. See Baltimore & Ohio R. Co. v. Koontz, 104 U. S. 5, where it was held that the Baltimore & Ohio Railroad Company, created under the laws of Maryland, had the right to remove into the federal court, on the ground of diverse citizenship, a suit brought against it in a Virginia court by a citizen of Virginia, although it had leased and was operating a railroad in Virginia.

Where an insurance company was organized under the laws of New York, it was held that the appointment by it of an agent in another state on whom service of process might be made, so as to enable it to do business in such other state under its laws, in no sense changed the domicile of the corporation, so as to make a debt owing by it to a resident of New York for a loss under a policy, occurring in the other state, an indebtedness existing in that state. Douglass v. Phenix Ins. Co. of Brooklyn, 138 N. Y. 209, 34 Am. St. Rep. 448, affirming 63 Hun, 393.

[19] Baltimore & Ohio R. Co. v. Koontz, 104 U. S. 5.

one state, doing business through an agent in another state, is "found" in the latter state, within the meaning of a statute allowing an action to be brought against a person in the district of which he may be an inhabitant or in which he may be found.[20]

§ 119. Distinction between a license and a charter from another state.

The fact that the legislature of a state passes a statute *licensing* a corporation created by or under the laws of another state to do business within its limits does not have the effect of creating a corporation, or make the corporation any the less a citizen and resident of the other state, and of that state only.[21] Whether or not a statute is a mere license or a charter depends, of course, upon the intention of the legislature, to be determined from the language of the statute, with the aid of the various rules governing the construction of statutes.

Thus, it was held that the Baltimore & Ohio Railroad Company, created by the laws of Maryland, was not a citizen or resident of Virginia by reason of a statute of the latter state which provided that "the same rights and privileges shall be, and are hereby, granted to the aforesaid company within the territory of Virginia, and the said company shall be subject to the same pains, penalties, and obligations as are imposed by said act [the act of Maryland], and the same rights, privileges, and immunities which are reserved to the state of Maryland or to the citizens thereof are hereby reserved to the state of Virginia and her citizens," as this was not the creation of a new corporation, but a mere license to the Maryland corporation.[22]

The contrary was held where, after an insurance company

[20] Blackburn v. Selma, Marion & M. R. Co., 2 Flip. 525, Fed. Cas. No. 1,467; Knott v. Southern Life Ins. Co., 2 Woods, 479, Fed. Cas. No. 7,894; Fonda v. British American Assur. Co., 6 Cent. Law J. 305, Fed. Cas. No. 4,904; Ex parte Schollenberger, 96 U. S. 369.

[21] Baltimore & Ohio R. Co. v. Harris, 12 Wall. (U. S.) 65, 1 Cum. Cas. 46; Pennsylvania R. Co. v. St. Louis, Alton & T. H. R. Co., 118 U. S. 290; Morgan v. East Tennessee & Virginia R. Co., 48 Fed. 705.

[22] Baltimore & Ohio R. Co. v. Harris, 12 Wall. (U. S.) 65, 1 Cum. Cas. 46.

with the name "Grangers' Life and Health Insurance Company" had been incorporated in Alabama, the legislature of Mississippi passed an act entitled "An act to authorize the Grangers' Life and Health Insurance Company to create and establish branch departments in this state," and providing that said company, "incorporated by, and under the laws of the state of Alabama, be and the same is hereby authorized and empowered to create and establish in this state, one or more branch departments thereof whenever there shall be subscribed to, and and paid into said company, * * * one hundred thousand dollars as capital stock for such branch department, so created and established, the said stock to be subscribed for, and owned by, and the directors of any such branch department to be, citizens of the state of Mississippi," and furthur providing that, whenever any such branch department or departments should be created and established, the said company "shall be regarded as a home company, and shall be entitled to, and may exercise and enjoy all the rights, privileges, immunities and exemptions of life insurance companies incorporated by the laws of the state of Mississippi," and making it the duty of the auditor of Mississippi, on the creation and establishment of any such branch department, to give to the officers or agents of said company a certificate "stating the same, and authorizing it to do business as a domestic life insurance company of Mississippi." It was held that the effect of this act was not merely to license or to enable the Alabama corporation to transact business and exercise its powers in Mississippi, but to create a distinct corporation in Mississippi having the same name and like franchises as the Alabama corporation.[23]

§ 120. Corporations created by congress.

A corporation created by congress in the exercise of its powers as the local legislature for the District of Columbia is a citizen and resident of the District, and is a foreign corporation

[23] Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325. See, also, Copeland v. Memphis & Charleston R. Co., 3 Woods, 651, Fed. Cas. No. 3,209; Blackburn v. Selma, Marion & M. R. Co., 2 Flip.

in so far as the states are concerned.[24] A national corporation, however,—that is, a corporation created by congress in the exercise of its powers as the legislature of the United States,—is not regarded as a foreign corporation, but as a domestic corporation, in any state or territory in which it may do business, or in which it may have an office.[25]

A corporation created by an act of congress in the exercise of its powers as the legislature of the United States may sue in the federal courts, or remove into the federal courts suits brought against it in the state courts, on the ground that such suits arise under the laws of the United States.[26]

National banks.—The jurisdiction of suits by and against national banks is fixed by the acts relating to these associations. Under the act of congress of February 18, 1875, the circuit courts of the United States were given jurisdiction of all suits by or against a national bank established within the district for which the court should be held, and such jurisdiction was not in any way affected by the citizenship of the parties or the amount in controversy.[27] But it was held that this provision had no application to suits brought by or against a national bank outside of the district in which it was established. As to such suits a national bank, for the purpose of determining the jurisdiction of the federal courts, was regarded as a citizen or resident of the state in which it was established.[28]

525, Fed. Cas. No. 1,467; Bachmann v. Supreme Lodge, Knights & Ladies of Honor, 44 Ill. App. 188.

[24] Hadley v. Freedman's Savings & Trust Co., 2 Tenn. Ch. 122; Daly v. National Life Ins. Co., 64 Ind. 1; Williams v. Creswell, 51 Miss. 817.

[25] Com. v. Texas & Pac. R. Co., 98 Pa. St. 90, where it was held that a railroad company created by congress to construct and operate a railroad from a point in Texas to a point in California was not a foreign corporation in Pennsylvania, where it had an office and also did business, within a revenue law of that state.

[26] Pacific Railroad Removal Cases, 115 U. S. 2.

[27] Rev. St. U. S. § 5198. See County of Wilson v. National Bank, 103 U. S. 770; First Nat. Bank of New Orleans v. Bohne, 8 Fed. 115; Third Nat. Bank of St. Louis v. Harrison, 8 Fed. 721.

This provision did not apply to suits in relation to land, or other local actions. Casey v. Adams, 102 U. S. 66.

[28] St. Louis Nat. Bank v. Allen, 5 Fed. 551; National Park Bank v. Nichols, 4 Biss. 315, Fed. Cas. No. 10,048; Manufacturers' Nat Bank v. Baack, 8 Blatchf. 137, Fed. Cas. No. 9,052. See, also, Cooke v. State Nat. Bank of Boston, 52 N. Y. 96, 11 Am. Rep. 667.

By the act of congress of July 12, 1882, it was provided that the jurisdiction for suits thereafter brought by or against any national banking association, except suits between them and the United States, or its officers and agents, should be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which might be doing business where such national bank might be doing business when such suits might be commenced; and all laws or parts of laws of the United States inconsistent with this provision were repealed. And by the act of August 13, 1888, it was provided that "all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located. And in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state." But it is provided that these provisions "shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."[29]

§ 121. Territorial corporations.

The legislative power to be exercised by the legislature of a territory of the United States is the legislative power of the territory, and not of the United States; and a corporation created by or under an act of a territorial legislature[30] is a coporation of the territory, and not a federal or national corporation, and therefore it cannot, as such, sue in the federal courts, even though it be conceded that corporations created under the laws of the United States have the right to sue in such courts.[31]

When a territory of the United States is erected into a state,

[29] 1 Supp. Rev. St. U. S. pp. 354, 614. See Union Nat. Bank of Cincinnati v. Miller, 15 Fed. 703.

[30] See ante, § 41.

[31] Adams Exp. Co. v. Denver & Rio Grande Ry. Co., 16 Fed. 712.

all corporations created by the territorial legislature become corporations of the state, and citizens or residents of the state for the purpose of determining the jurisdiction of the federal courts.[32]

§ 122. Residence or domicile within the state.

It is often necessary to ascertain the residence or domicile of a corporation within the state by or under whose laws it was created, not only for the purpose of determining the jurisdiction of the state courts in actions by or against the corporation, but also for the purpose of determining the application of statutes in relation to taxation and various other matters. The question is sometimes settled by express statutory provision, but this is not always the case. The general rule is that the residence or domicile of a corporation within the state is in that county, city, or town, and that one only, in which it has its general or principal office and conducts its business;[33] and it can

[32] Kansas Pac. R. Co. v. Atchison, Topeka & S. F. R. Co., 112 U. S. 414.

[33] Adams v. Great Western Ry. Co., 6 Hurl. & N. 404; Bank of United States v. McKenzie, 2 Brock. 393, Fed. Cas. No. 927; Jenkins v. California Stage Co., 22 Cal. 537; Creditor v. Consumers' Lumber Co., 98 Cal. 318; Bristol v. Chicago & Aurora R. Co., 15 Ill. 436; Sangamon & Morgan R. Co. v. Morgan County, 14 Ill. 163; Chicago, Danville & V. R. Co. v. Bank of North America, 82 Ill. 493; Baldwin v. Mississippi & Missouri R. Co., 5 Clarke (Iowa) 518; Davis v. Central Railroad & Banking Co., 17 Ga. 323; Land Grant Railway & Trust Co. v. Coffey County Com'rs, 6 Kan. 245; Gill's Adm'x v. Kentucky & C. Gold & Silver Min. Co., 7 Bush. (Ky.) 635; New Orleans, Jackson & G. N. R. Co. v. Wallace, 50 Miss. 244; Conroe v. National Protection Ins. Co., 10 How. Pr. (N. Y.) 403; Miner v. Village of Fredonia, 27 N. Y. 155, 160; People v. Taxes & Assessment Com'rs, 47 How. Pr. (N. Y.) 164; Perry v. Round Lake Camp Meeting Ass'n, 22 Hun (N. Y.) 293; St. Michaels Protestant Episcopal Church v. Behrens, 10 N. Y. Civ. Proc. R. 181; Glaize v. South Carolina R. Co., 1 Strob. (S. C.) 70; Cromwell's Ex'rs v. Charleston Ins. & Trust Co., 2 Rich. (S. C.) 512; Connecticut & Passumpsic Rivers R. Co. v. Cooper, 30 Vt. 476, 73 Am. Dec. 319; Cowardin v. Universal Life Ins. Co., 32 Grat. (Va.) 445.

See, also, Thorn v. Central R. Co., 26 N. J. Law, 121; Crookston v. Centennial Eureka Mining Co., 13 Utah, 117; Rossie Iron Works v. Westbrook, 59 Hun (N. Y.) 345; Holgate v. Oregon Pac. R. Co., 16 Or. 123; Macmaster v. Advance Thresher Co., 10 Wash. 147; Speare v. Troy Laundry Machine Co., 44 App. Div. (N. Y.) 390.

Compare Kline v. Bryson City Mfg. Co., 116 N. C. 837.

In Vermont it was held that the residence of a railroad company, for the purpose of bringing actions, is in the county on the line of its road where its principal office is

make no difference that its directors or trustees meet at other places within the state,[34] or that the personal residence of some or all of its officers or shareholders is in some other place.[35]

A statement in the charter of a corporation, or in the articles or certificate of incorporation, as required by a statute, as to the corporation's principal office or place of business, is conclusive on the corporation on the question of its residence or domicile.[36]

situated. Connecticut & Passumpsic Rivers R. Co. v. Cooper, 30 Vt. 476, 73 Am. Dec. 319.

And in Georgia it was held that the county in which a railroad company conducts its business is the county of its residence, within a constitutional provision that no person shall be sued elsewhere than in the county in which he resides. Davis v. Central Railroad & Banking Co., 17 Ga. 323.

Where a religious corporation maintained a treasurer's office in one place, and transacted its business there, and conducted its religious exercises in another place, it was held that its residence was at the former place. St. Michael's Protestant Episcopal Church v. Behrens, 10 N. Y. Civ. Proc. R. 181.

If the chief office and place of business of a corporation is not designated by its charter, vote of its stockholders, or resolution of its directors, it is where its stockholders and directors usually meet, where it elects its officers, and conducts its financial operations. Frick Co. v. Norfolk & Ocean View R. Co., 86 Fed. 725.

The general officers of a corporation cannot, by changing the location of their offices for the more convenient transaction of business, remove the principal office from the place at which it has been established by its stockholders and directors, so as to change its domicile. Frick Co. v. Norfolk & Ocean View R. Co., 86 Fed. 725.

[34] Perry v. Round Lake Camp Meeting Ass'n, 22 Hun (N. Y.) 293.

That the principal office of a cemetery corporation is in an office building on its grounds, where its business is conducted, although official meetings have been held at other places for the sake of convenience, see Stinson v. Cedar Grove Cemetery Co. (N. J. Ch.) 40 Atl. 116.

The county in which the manufactory of a corporation is located, and where it conducts its business, is the county in which its principal place of business is located, within the meaning of a statute giving jurisdiction of insolvency proceedings to the probate court of such county, although in another county it has the office of its clerk, where nothing is done except the holding of stockholders' meetings, the making and preserving of records of their proceedings, and making its sales and collections in another state. Kenneth v. Woodworth-Mason Co., 68 N. H. 432.

[35] Perry v. Round Lake Camp Meeting Ass'n, 22 Hun (N. Y.) 293.

[36] People v. Barker, 16 Misc. Rep. (N. Y.) 252; Western Transp. Co. v. Scheu, 19 N. Y. 408; Olmstead v. Rochester & Pittsburg R. Co., 8 N. Y. St. Rep. 856; Pelton v. Northern Transp. Co., 37 Ohio St. 450.

Under a statute providing for the organization of corporations, and requiring the articles or certificate of incorporation to designate the city or county in which the principal office is to be situated, the county or city so designated by the corporation is its domicile, although it may have an office in another place, where its principal officers reside during the business season, and where the greater part

A corporation may be, under some statutes and for some purposes, a resident of several counties if it owns property and does business in several counties. Thus, it has been held that a railroad company which passes through and occupies lands in several counties for the carrying on of its corporate business is, for the purposes of taxation, to be regarded as a resident of each town and county through which it passes, and its real estate, therefore, is properly assessed *in personam* as the land of a resident, and not as the land of a nonresident.[37] And in like manner a corporation like a railroad, turnpike, or canal company, doing business and having property and places of business in several counties, may be regarded as having a residence or domicile in each for the purpose of actions by or against it.[38]

of its business is done. Western Transp. Co. v. Scheu, 19 N. Y. 408. And see Pelton v. Northern Transp. Co., 37 Ohio St. 450.

Where the charter of a railroad company designated a certain city as the place of its office, and the company represented the same to the railroad commissioners as the place of its general office, being the place where its transfer and stock books and its accounts of receipts and disbursements were kept, and where its officers were elected, it was held that such city was the place of its principal office, although the operation of its road was conducted in another city. Olmstead v. Rochester & Pittsburgh R. Co., 8 N. Y. Ct. Rep. 856.

[37] Buffalo & State Line R. Co. v. Erie County Sup'rs, 48 N. Y. 93. See, also, Hoyle v. Plattsburg & Montreal R. Co., 54 N. Y. 314.

[38] Edwards v. Union Bank of Florida, 1 Fla. 136; Richardson v. Burlington & Missouri River Ry. Co., 8 Clarke (Iowa) 260; Baldwin v. Mississippi & Missouri R. Co., 5 Clarke (Iowa) 518; Androscoggin & Kennebec R. Co. v. Stevens, 28 Me. 434; Rhodes v. Salem Turnpike & Chelsea Bridge Corp., 98 Mass. 95; Harding v. Chicago & Alton R. Co., 80 Mo. 659; Thorn v. Central R. Co., 26 N. J. Law, 121; Crofut v. Brooklyn Ferry Co., 36 Barb. (N. Y.) 201; Pond v. Hudson River R. Co., 17 How. Pr. (N. Y.) 543.

See, also, Empire State Ins. Co. v. Collins, 54 Ga. 376; Merritt v. Cotton States Life Ins. Co., 55 Ga. 103; Baltimore & T. Turnpike Road v. Crowther, 63 Md. 558; Schoch v. Winona & St. Paul R. Co., 55 Minn. 479; Slavens v. South Pacific R. Co., 51 Mo. 308; Fremont Butter & Egg Co. v. Snyder, 39 Neb. 632.

Compare Davis v. Central Railroad & Banking Co., 17 Ga. 323; Connecticut & Passumpsic Rivers R. Co. v. Cooper, 30 Vt. 476, 73 Am. Dec. 319.

In Dade Coal Co. v. Haslett, 83 Ga. 549, it was held that where a mining company was authorized by law to carry on business in any county, and it conducted its principal mining business in one county, but had in another county an office "for the purpose of electing its officers and conducting its financial operations," it was within the jurisdiction of the courts of the latter county.

CHAPTER VII.

POWERS OF CORPORATIONS IN GENERAL.

§ 123. The general rule.
124. Powers not granted are prohibited.
125. Benefit to corporation and consent of shareholders.
126. Application of the rule to particular corporations.
127. Construction of charters in general.
(a) What constitutes the charter.
(b) General rules of construction.
128. Powers impliedly conferred.
129. Mode of exercising powers.
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§ 123. The general rule.—A corporation has such powers, and such powers only, as are expressly or impliedly conferred upon it by its charter, and any act which is not within the powers so conferred is impliedly prohibited, however beneficial it may be to the corporation, and notwithstanding the fact that it may be consented to or ratified by all the stockholders or members.

A natural person does not derive his powers, any more than he derives his existence, from the sovereign, and therefore he may lawfully make any contract, or do any act, which is not forbidden by the law. The same is true of an ordinary partnership. It is a mere voluntary association of individuals, and its powers are coextensive with the powers of the individuals who compose it. It is very different in the case of a corporation. A corporate body, as we have seen, is a mere creature of the law, and its powers, like its existence, are derived from the state. It has no natural powers. It is well settled, therefore, that a corporation can lawfully exercise no other powers than such as are expressly or impliedly conferred upon it by its charter.[1]

[1] England: Coleman v. Eastern Keener's Cas. 446, 1 Cum. Cas. 136; Counties Ry. Co., 10 Beav. 1, 1 East Anglian Ry. Co. v. Eastern

"An individual," it has been said, "has an absolute right freely to use, enjoy and dispose of all his acquisitions, without any control or domination, save only by the laws of the land. But the civil rights of a corporation (for it has no natural rights) are widely different. The law of its nature, or its birthright, in the most comprehensive sense, is such, and such

Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557; Wenlock v. River Dee Co., 19 Q. B. Div. 155, 10 App. Cas. 354, 1 Smith's Cas. 577, 1 Cum. Cas. 277; Attorney General v. Great Eastern Ry. Co., 5 App. Cas. 473.

United States: Pearce v. Madison & Indianapolis R. Co., 21 How. 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44.

Alabama: Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Chewacla Lime Works v. Dismukes, 87 Ala. 344, 1 Keener's Cas. 469.

Connecticut: New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100.

Georgia: Harriman v. First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117; Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; Central R. Co. v. Collins, 40 Ga. 582, 1 Keener's Cas. 706; Cherokee Iron Co. v. Jones, 52 Ga. 276.

Illinois: Ohio & Mississippi R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Metropolitan Bank v. Godfrey, 23 Ill. 579; Caldwell v. City of Alton, 33 Ill. 416, 85 Am. Dec. 282; Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530; People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319, 2 Smith's Cas. 952; National Home Building & Loan Ass'n v. Home Savings Bank, 181 Ill. 35, 72 Am. St. Rep. 245; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26; People v. Pullman's Palace Car Co., 175 Ill. 125; First M. E. Church of Chicago v. Dixon, 178 Ill. 260.

Indiana: Brooklyn Gravel Road Co. v. Slaughter, 33 Ind. 185; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302; Huter v. Union Trust Co., 51 N. E. 1071.

Iowa: Lucas v. White Lime Transfer Co., 70 Iowa, 541, 59 Am. Rep. 449, 1 Keener's Cas. 460; Bathe v. Decatur County Agricultural Soc., 73 Iowa, 11, 5 Am. St. Rep. 651.

Kentucky: Thweatty v. Bank of Hopkinsville, 81 Ky. 1.

Maine: Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Keener's Cas. 504, 1 Cum. Cas. 343.

Maryland: Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95, 2 Cum. Cas. 104; Lazear v. National Union Bank, 52 Md. 78, 36 Am. Rep. 355.

Massachusetts: Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Keener's Cas. 457, 1 Smith's Cas. 564, 1 Cum. Cas. 173.

Michigan: Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261; People v. River Raisin & Lake Erie R. Co., 12 Mich. 389, 86 Am. Dec. 64; Bank of Michigan v. Niles, Walk. 99, 1 Smith's Cas. 493, 1 Doug. 401, 41 Am. Dec. 575.

Minnesota: Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334.

Mississippi: Abby v. Bullups, 35 Miss. 618, 72 Am. Dec. 148; Greenville Compress & Warehouse Co.

only, as its charter confers."[2] "A corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes."[3]

A general statute providing that any person or corporation may engage in a particular business under certain conditions does not authorize a corporation to engage in such a business if it was organized for an entirely different purpose. Thus it has been held that a corporation organized for the purpose of manufacturing and selling nails and other products of iron and steel is not authorized to engage in the business of a public warehouseman, or to issue warehouse receipts, by a general statute declaring that "any person or incorporated company" desiring to keep a public warehouse shall be entitled

v. Planters' Compress & Warehouse Co., 70 Miss. 669, 35 Am. St. Rep. 681.

Missouri: Blair v. Perpetual Ins. Co., 10 Mo. 565, 47 Am. Dec. 129; Matthews v. Skinker, 62 Mo. 329, 21 Am. Rep. 425.

Nebraska: State v. Atchison & Nebraska R. Co., 24 Neb. 161, 8 Am. St. Rep. 164.

New Hampshire: Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Cum. Cas. 148, 1 Smith's Cas. 148.

New Jersey: Elkins v. Camden & Atlantic R. Co., 36 N. J. Eq. 5, 1 Keener's Cas. 722.

New York: Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14, 1 Keener's Cas. 781, 1 Cum. Cas. 293, 1 Smith's Cas. 497; Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 19 Am. St. Rep. 482, 1 Smith's Cas. 500, 1 Keener's Cas. 819; People v. Campbell, 144 N. Y. 166.

Ohio: Straus v. Eagle Ins. Co., 5 Ohio St. 59; White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co., 12 Ohio St. 601.

Oklahoma: Peck-Williamson Heating & Ventilating Co. v. Board of Education of Oklahoma City, 6 Okl. 279.

Pennsylvania: Com. v. Erie & North East R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Fowler v. Scully, 72 Pa. St. 456, 13 Am. Rep. 699; First Nat. Bank of Allentown v. Hoch, 89 Pa. St. 324, 33 Am. Rep. 769.

Tennessee: Mallory v. Hanaur Oil Works, 86 Tenn. 598, 1 Keener's Cas. 678; Miller v. American Mutual Accident Ins. Co., 92 Tenn. 167.

Texas: Gulf, Colorado & S. F. Ry. Co. v. Morris, 67 Tex. 602.

Wisconsin: Rock River Bank v. Sherwood, 10 Wis. 230, 78 Am. Dec. 669; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Cum. Cas. 245, 1 Smith's Cas. 590; Madison, Watertown & M. Plank Road Co. v. Watertown & Portland Plank Road Co., 7 Wis. 59.

Many other cases are more specifically cited in this and succeeding chapters.

[2] Hosmer, C. J., in New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100.

[3] Chief Justice Taney, in Bank of Augusta v. Earle, 13 Pet. (U. S.) 587.

to do so upon receiving a permit therefor from a particular public officer. The statute applies to such corporations only as are organized for the purpose of keeping a public warehouse.*

§ 124. Powers not granted are prohibited.

It has been said in some of the English cases, not that a corporation has such powers only as are conferred by its charter, but that it has such powers as are not prohibited thereby, or, in other words, that a corporation may do any act that is not prohibited by its charter.[4] This *dictum,* however, cannot be sustained, if it really means that a corporation can lawfully exercise any power not conferred, either expressly or impliedly. In a leading case in the supreme court of the United States, in which the question was whether a railroad company had the power to make a lease, the lessees contended that a corporation may do any act which is not prohibited by its charter, but the court did not concur. "We take the general doctrine to be in this country," it was said, "that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."[5] In a later case in

* Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302. "If the appellant's construction of the section is the correct one," said the court in this case, "then all the corporations in the state, whether educational, charitable, religious, commercial, or otherwise, whatever may be the provisions of the law under which organized, are given the right of going into and carrying on the business of public warehousemen. While the language of the section is very broad, it was certainly not the intention of the legislature to confer on all the corporations in the state, without regard to the law under which they were organized, and the purposes and objects of their organization, the privileges of public warehousemen. As well hold that persons without the capacity to contract on account of infancy, insanity, or other disqualifications, were, by the statute, authorized to engage in the business of public warehousemen, and execute valid warehouse receipts."

[4] South Yorkshire Railway & River Dun Co. v. Great Northern Ry. Co., 9 Exch. 84; Scottish North Eastern Ry. Co. v. Stewart, 3 Macq. H. L. Cas. 382. And see Thompson v. Waters, 25 Mich. 227, 12 Am. Rep. 243.

[5] Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Smith's Cas. 465, 1

the same court it was said: "The clear result of the decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental."[6]

Even in England it is settled that powers not expressly or impliedly granted by the charter of a corporation are impliedly prohibited, and the rule, therefore, is in effect the same as in the United States. As was said by Lord Cranworth in the house of lords, speaking of a railway company: "Practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with its corporate duties, or that it is impliedly prohibited from so doing, because by necessary inference the legislature must be considered to have intended that no such contracts should be entered into."[7]

§ 125. Benefit to corporation and consent of shareholders.

The rule that a corporation has such powers only as are conferred by its charter is based upon the ground that a corporation derives its powers, as well as its existence, from the state, and not on the ground that the exercise of powers not so con-

Cum. Cas. 164. See, also, Mallory v. Hanaur Oil Works, 86 Tenn. 598, 1 Keener's Cas. 678; State v. Florida Cent. R. Co., 15 Fla. 690.

[6] Mr. Justice Gray in Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 34, 48, 1 Keener's Cas. 618, 2 Cum. Cas. 44.

[7] Shrewsbury & Birmingham Ry. Co. v. Northwestern Ry. Co., 6 H. L. Cas. 113. See, also, Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136; East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142.

In Riche v. Ashbury Railway Carriage & Iron Co., L. R. 9 Exch. 224, 2 Cum. Cas. 34, it was said by Blackburn, J., in the exchequer chamber: "I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, Does the statute creating the corporation by express provision, or by necessary implication, show an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract,

ferred is injurious to the corporation or to its members. And it follows, therefore, that a corporation has no power to make contracts or engage in transactions which are foreign to the objects for which it was created, merely because such contracts or transactions will be beneficial to it.[8]

Nor can such powers be conferred by consent of the shareholders,[9] or by the by-laws adopted by them.[10] It follows that an act which is not within the powers of a corporation cannot be ratified by the stockholders, even though all may consent, so as to become valid.[11]

§ 126. Application of the rule to particular corporations.

(a) Miscellaneous corporations.—It follows from the rule that the powers of a corporation are such only as are conferred by its charter, that, if a corporation engages in any

the question is, Does the statute creating the corporation by express provision, or necessary implication, show an intention in the legislature, to prohibit and so avoid the making of, a contract of this particular kind?"

This case was reversed in the house of lords, and it was held in effect that a corporation has such powers only as are conferred upon it by its charter, expressly or impliedly, and that all powers not so conferred upon it are impliedly prohibited. Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557.

[8] Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136; East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Keener's Cas. 457, 1 Cum. Cas. 173, 1 Smith's Cas. 564; Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Cherokee Iron Co. v. Jones, 52 Ga. 276; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334.

[9] Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136; East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557; Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164; National Trust Co. v. Miller, 33 N. J. Eq. 155; Cherokee Iron Co. v. Jones, 52 Ga. 276; Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Cum. Cas. 148, 1 Smith's Cas. 148.

[10] Mutual Benefit Life Ins. Co. v. Utter, 34 N. J. Law, 489; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Traders' & Mechanics' Ins. Co. v. Brown, 142 Mass. 403; Andrews v. Union Mutual Fire Ins. Co., 37 Me. 256.

[11] Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557; Elkins v. Camden & Atlantic R. Co., 36 N. J. Eq. 5, 1 Keener's Cas. 722.

other business than that contemplated by its charter, its acts and contracts in such business are *ultra vires*. Thus, a corporation created for the purpose of *booming* logs cannot lawfully engage in the business of *driving* logs.[12] A manufacturing company, authorized by its charter to manufacture only, cannot lawfully engage in buying and selling goods, where such business is not necessary or incidental to its manufacturing business. Nor can it engage in any other business not reasonably incidental to its manufacturing.[13] It cannot lawfully

[12] Bangor Boom Corp. v. Whiting, 29 Me. 123.

[13] Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Keener's Cas. 762, 1 Cum. Cas. 261; People v. Campbell, 144 N. Y. 166; Getty v. C. R. Barnes Milling Co., 40 Kan. 281; Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. St. 109; Slater Woollen Co. v. Lamb, 143 Mass. 420, 1 Cum. Cas. 260.

A corporation organized solely for the manufacture of electric appliances has no power to engage in the business of selling electric supplies manufactured by others. Powell v. Murray, 157 N. Y. 717, affirming 3 App. Div. 273.

A corporation organized for the purpose of manufacturing and selling heating and ventilating apparatus cannot become a negotiator or broker of bonds on commission. Peck-Williamson Heating & Ventilating Co. v. Board of Education of Oklahoma City, 6 Okla. 279.

A corporation organized for the purpose of manufacturing and selling nails, and other products of steel and iron, is not authorized to engage in the business of a public warehouseman, and has no power to issue warehouse receipts. Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302. See, also, Geilfuss v. Corrigan, 95 Wis. 651, 60 Am. St. Rep. 143.

A corporation organized to manufacture pig iron cannot erect machinery and engage in the business of grinding grain for the public generally, although it may do so in order to furnish such grain as may be necessary for the use of its laborers, and of its animals, employed in its business as a manufacturer of iron. Cherokee Iron Works v. Jones, 52 Ga. 276.

A corporation whose articles of incorporation state that "its business shall be the manufacturing of clothing of every description, and the sale of clothing so manufactured, and the transaction of all other business necessary and incidental to such manufacture and sale of clothing," is a manufacturing corporation exclusively, and has no power to also deal in clothing manufactured by others. Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334.

A corporation authorized by its charter "to have, purchase, receive, possess and enjoy lands, rights, tenements, hereditaments, goods, chattels and effects, in any amount the body corporate may deem necessary to carry all the objects of said corporation into full force and effect; which objects are to mine lime rock and manufacture the same, to keep up and run such machinery as may be necessary to saw lumber and make barrels for the packing of said lime, and the same to sell, devise, grant, alien, and dispose of," has no implied power to carry on a general mercantile business. Chewacla Lime Works v. Dismukes, 87 Ala. 344, 1 Keener's Cas. 469.

engage in manufacturing any other goods than those for the manufacture of which it was created.[14]

A trading company authorized to deal in certain goods only cannot lawfully engage in buying and selling other goods.[15] A lumber company, authorized by its charter to manufacture and sell lumber only, cannot lawfully engage in the business of constructing buildings, even as a means of disposing of its lumber.[16] Nor can a corporation created for the purpose of publishing a newspaper lawfully offer to pay money to the heirs of any person who, when killed, has on his person a coupon cut from its paper, as this is in effect life insurance.[17]

An agricultural society incorporated for the purpose of furthering the interests of agriculture, improving and encouraging the breeding of stock, and for holding annual fairs and exhibitions of agricultural products and stock, and authorized to do everything necessary or incidental to such purposes, has no power to employ persons to convey people in their own conveyances to and from the fair grounds.[18]

(b) Railroad, steamboat, and turnpike companies.—A corporation created for the purpose of constructing and operating or

[14] Whitney Arms Co. v. Barlow, 38 N. Y. Super. Ct. 554, 63 N. Y. 62, 20 Am. Rep. 504, 1 Cum. Cas. 263; Simmons v. Troy Iron Works, 92 Ala. 427.

Under a statute authorizing the formation of corporations for the transaction of any manufacturing, mining, mechanical, chemical, mercantile, and produce business, either separately or combined, a corporation authorized by its charter to manufacture sugar, syrup, starch, and glucose, and "for the transaction of manufacturing, mechanical and mercantile business," may carry on the business of manufacturing and selling matches and woodenware, in addition to the manufacture of sugar, etc. Parkinson Sugar Co. v. Bank of Fort Scott, 60 Kan. 474.

[15] Bowman Dairy Co. v. Mooney, 41 Mo. App. 665 (where it was held that a corporation for buying and selling dairy products could not buy and sell oysters); and cases cited in the two preceding notes.

In a Pennsylvania case it was held that a corporation authorized by its charter to engage in "any work or works, public or private, which might tend or be designed to improve, increase, facilitate or develop trade," might engage in the business of producing and supplying natural gas, under the natural gas act, the preamble of which declares that natural gas has become "a prime necessity for use as a fuel and otherwise in the development of trade." Carothers v. Philadelphia Co., 118 Pa. St. 468.

[16] Dalles Lumber & Mfg. Co. v. Wasca Woolen Mfg. Co., 3 Or. 527.

[17] Brisay v. Star Co., 13 Misc. Rep. (N. Y.) 349.

[18] Bathe v. Decatur County Agricultural Soc., 73 Iowa, 11, 5 Am. St. Rep. 651.

maintaining a railroad or turnpike between certain points or along a certain route cannot lawfully construct and maintain a road between other points or along another route.[19] Nor can a railroad, steamboat, or turnpike company engage in another business, not incidental to the business for which it was created. Thus, a railroad or steamboat company has no power to engage in buying and selling goods,[20] or to speculate in land.[21] And a turnpike company has no power to purchase wagons and horses, and engage in transporting passengers for hire, even over its own road.[22] A railroad company, in the absence of express authority in its charter, has no power to run a line of steamboats in connection with its railroad, but beyond its terminus.[23]

(c) **Insurance companies.**—An insurance company cannot engage in any other business than that of insurance, as banking, for example.[24] Nor can it lawfully engage in any other kind of insurance than that authorized by its charter.[25] Thus, a corporation authorized to insure against accidents "in traveling" cannot lawfully insure against any and all accidental injury;[26] and a corporation authorized to insure against damage

[19] Stevens v. Rutland & Burlington R. Co., 29 Vt. 545; North Eastern R. Co. v. Payne, 8 Rich. Law (S. C.) 177.

[20] Attorney General v. Great Northern Ry. Co., 1 Drew. & S. 154; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Cum. Cas. 245, 1 Smith's Cas. 590; post, § 145.

[21] Case v. Kelly, 133 U. S. 21, 1 Keener's Cas. 589, 1 Smith's Cas. 495, 1 Cum. Cas. 106; post, § 138.

[22] Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Smith's Cas. 148, 1 Cum. Cas. 148.

[23] Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146. And see Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136; Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353, 1 Smith's Cas. 435.

[24] Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Memphis v. Memphis City Bank, 91 Tenn. 574.

A mutual insurance company has no implied power to engage in the business of a building and loan association, unless expressly authorized by its charter. Such power is not conferred by a grant of authority to invest or loan its funds. Huter v. Union Trust Co. (Ind.) 51 N. E. 1071.

[25] Miller v. American Mutual Accident Ins. Co., 92 Tenn. 167; Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 50 Am. Rep. 134, 1 Cum. Cas. 227, 1 Smith's Cas. 568; Rochester Ins. Co. v. Martin, 13 Minn. 59; Andrews v. Union Mutual Fire Ins. Co., 37 Me. 257; In re Phoenix Life Assurance Co., 2 Johns. & H. 441.

[26] Miller v. American Mutual Accident Ins. Co., 92 Tenn. 167.

by fire or lightning cannot lawfully insure against damage by hail.[27]

(d) **Banks.**—A corporation created for the purpose of banking, only, has no power to engage in a business not incidental to banking, as manufacturing or the buying and selling of goods or land on speculation,[28] or acting as broker or agent in buying or selling bonds or stocks,[29] etc.

Nor has an insurance company, railroad company, trading company, or any other corporation not created for the purpose of banking, any authority to engage in such business.[30] Authority to engage in the business of banking is not included in a grant of authority merely to buy and sell negotiable paper.[31] Prohibition against engaging in banking is elsewhere considered.[32]

§ 127. Construction of charter in general.

(a) What constitutes the charter—Special acts.—When a corporation is created by a special act of the legislature, its charter consists of the act itself, construed in the light of, and subject to, any general laws which are applicable to the corporation, and supplemented by the articles of association, if any, executed by the corporators under and within the authority con-

[27] Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 1 Cum. Cas. 227, 1 Smith's Cas. 568.

[28] Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Doug. (Mich.) 401, 1 Cum. Cas. 291; Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 19 Am. St. Rep. 482, 1 Keener's Cas. 819, 1 Smith's Cas. 500; Louis Bletz & Co. v. Bank of Kentucky (Ky.) 55 S. W. 697.

A banking corporation cannot take a mortgage from a manufacturing company, and agree therein to carry on the latter's business. Louis Bletz & Co. v. Bank of Kentucky (Ky.) 55 S. W. 697.

[29] Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95, 2 Cum. Cas. 104; First Nat. Bank of Allentown v. Hoch, 89 Pa. St. 324, 33 Am. Rep. 769.

[30] Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Memphis v. Memphis City Bank, 91 Tenn. 574; People v. River Raisin & Lake Erie R. Co., 112 Mich. 389, 86 Am. Dec. 64.

A railroad company cannot issue paper designed to circulate as money, as this is an act of banking. People v. River Raisin & Lake Erie R. Co., supra.

[31] Sumner v. Marcy, 3 Woodb. & M. 112, Fed. Cas. No. 13,609; State v. Granville Alexandrian Soc., 11 Ohio, 1; In re Ohio Life Insurance & Trust Co., 9 Ohio, 291; Duncan v. Maryland Savings Institution, 10 Gill & J. (Md.) 299.

[32] See post, §§ 147, 175.

ferred upon them by the act,[33] and by other charters or statutes expressly or impliedly made a part of the charter.[34] When an existing association is incorporated, and its constitution is expressly recognized by its charter, it becomes a part of its charter.[35]

——**Corporations organized under general laws.**—When a corporation is organized under a general corporation law authorizing the formation of such corporations, its charter consists of the law under which it is organized, and of the articles or certificate of association or incorporation adopted or issued in pursuance of the law, in so far as they are in compliance with and authorized by the law.[36]

The articles or certificate do not alone constitute the charter, and determine the powers of the corporation, but they are to be taken in connection with the statute. The statute is controlling, and the articles or certificate are valid and effectual, not only in so far as they are not in conflict with the statute, but in so far as the powers therein claimed are authorized by the statute.[37] So, when a corporation is organized and a charter granted by the court under a general law, the order or

[33] See Cheraw & Salisbury R. Co. v. Commissioners of Anson, 88 N. C. 519; Mechanics' & Traders' Bank v. Rowly, 2 La. Ann. 372.

[34] See Mechanics' & Traders' Bank v. Rowly, 2 La. Ann. 372.

A provision in a special charter that the corporation shall have all the powers, and be subject to all the liabilities, provided by a general law, does not incorporate into the charter a provision of the general law imposing a penalty on trustees of corporations organized under it for failure to file reports. National Park Bank of New York v. Remsen, 158 U. S. 337.

[35] Pulford v. Fire Department of City of Detroit, 31 Mich. 458.

[36] Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325; People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319, 2 Smith's Cas. 952; Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42; Van Etten v. Eaton, 19 Mich. 187; Taggart v. Perkins, 73 Mich. 303; State v. Central Iowa Ry. Co., 71 Iowa, 410, 60 Am. Rep. 806; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279; Society for Visitation of the Sick v. Com., 52 Pa. St. 125, 91 Am. Dec. 139; Knights of Pythias v. Weller, 93 Va. 605; In re Fuller Laundry Co. (Minn.) 82 N. W. 673; Cronin v. Potter's Co-op. Co., 29 Wkly. Law Bul. (Ohio) 52.

[37] Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325; Republican Mountain Silver Mines v. Brown, 19 U. S. App. 203, 58 Fed. 644; People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319, 2 Smith's Cas. 952; Eastern Plank Road Co. v. Vaughan, 14 N. Y. 516; Heck v. McEwen, 12 Lea (Tenn.) 97, 1 Keener's Cas. 97; Knights of Pythias v. Weller, 93 Va. 605.

certificate of the court is void in so far as it purports to confer powers not authorized by the statute.[38]

——**Amendments.**—If the legislature amends the charter of a corporation, and the amendatory act is accepted by the corporation, as explained in another chapter, the amendatory act becomes a part of the charter.[39] And if the legislature, by an act which is constitutional, recognizes a corporation as having a particular power,—as the power to take land, for example,—this is equivalent to an express grant of such power.[40]

——**Special charter after incorporation under general law.**—It has been held that the acceptance of a special act of incorporation by a corporation which has been previously organized under the general law does not affect the organization under the general law to such an extent as to invalidate contracts or mortgages made after the passage of the special act, but before its acceptance, and that the charter of the company, after such acceptance, consists of both the general law and the special act, in so far as they are not inconsistent.[41]

——**By-laws.**—The by-laws of a corporation merely affect the management of its business and control its officers and agents. They constitute no part of its charter, and therefore can neither add to nor detract from its powers.[42]

(b) General rules of construction—(1) Intention of the legislature.—The cardinal rule of statutory construction, that the intention of the legislature must govern, is just as applicable to special and general acts of incorporation as to any other statute.[43] When there is no reasonable doubt as to the intention

[38] Greeneville & P. R. Narrow Gauge R. Co. v. Johnson, 8 Baxt. (Tenn.) 332; Heck v. McEwen, 12 Lea (Tenn.) 97, 1 Keener's Cas. 97.

[39] Louisville & Portland R. Co. v. Louisville City Ry. Co., 2 Duv. (Ky.) 175; Mulloy v. Nashville & Decatur R. Co., 8 Lea (Tenn.) 427.

[40] Society for Propagation of the Gospel v. Town of Pawlet, 4 Pet. (U. S.) 480, 501; Shaw v. Norfolk County R. Co., 5 Gray (Mass.) 162. And see ante, § 43.

[41] Johnston v. Crawley, 25 Ga. 316, 71 Am. Dec. 173.

[42] Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Kelly v. Mobile Bldg. & Loan Ass'n, 64 Ala. 501; Steiner v. Steiner Land & Lumber Co., 120 Ala. 128; post, chapter xxiv.

[43] Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95; Chesapeake & Ohio Canal Co. v. Key, 3 Cranch, C. C. 599, Fed. Cas. No. 2,649; The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.) 3 Wall. (U. S.) 51.

of the legislature, all the courts have to do is to give it effect, provided, of course, the statute is constitutional.

——**(2) Strict construction of charters.**—When there is any doubt as to the intention of the legislature, the rule of construction, for the purpose of determining what powers are conferred upon a corporation by its charter, is that the charter, like other grants from the state, is to be construed most strictly against the corporation and in favor of the public, and that powers not clearly granted are to be regarded as impliedly withheld.[44]

This is certainly true when a corporation claims powers and privileges not enjoyed by others, or in derogation of common right, or of the common law, as the power to do an act which will create a nuisance, etc.[45] It is true when a corporation claims exemption from taxation,[46] or exclusive rights or priv-

1 Smith's Cas. 170; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 221; Burke v. Concord R. Co., 61 N. H. 192; Morris Canal & Banking Co. v. Central R. Co., 16 N. J. Eq. 419; White v. Syracuse & Utica R. Co., 14 Barb. (N. Y.) 559; Straus v. Eagle Ins. Co., 5 Ohio St. 60.

[44] Proprietors of Stourbridge Canal v. Wheeley, 2 Barn. & Adol. 792, 1 Smith's Cas. 152, 1 Cum. Cas. 298; Parker v. Great Western Ry. Co., 7 Man. & G. 288; Perrine v. Chesapeake & Delaware Canal Co., 9 How. (U. S.) 172; Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 Fed. 957; Grand Lodge of Alabama v. Waddill, 36 Ala. 318; Hooker v. New Haven & Northampton Co., 15 Conn. 321; Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; American Loan & Trust Co. v. Minnesota & Northwestern R. Co., 157 Ill. 641; Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361; State v. Payne, 129 Mo. 468; De Lancey v. Rockingham Farmers' Mutual Fire Ins. Co., 52 N. H. 581; Jersey City Gaslight Co. v. Consumers' Gas Co., 40 N. J. Eq. 427; Auburn & Cato Plank Road Co. v. Douglass, 9 N. Y. 444; Dugan v. Bridge Co., 27 Pa. St. 303, 67 Am. Dec. 464; Com. v. Erie & North East R. Co., 27 Pa. St. 356, 67 Am. Dec. 471; Pennsylvania R. Co. v. Canal Commissioners, 21 Pa. St. 22; Port of Mobile v. Louisville & Nashville R. Co., 84 Ala. 115, 5 Am. St. Rep. 342.

[45] See the cases above cited. And see, particularly, Providence Bank v. Billings, 4 Pet. (U. S.) 514; Beaty v. Knowler, 4 Pet. (U. S.) 152; Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U. S. 659; Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; Snell v. Buresh, 125 Ill. 151; Coolidge v. Williams, 4 Mass. 145; Keyport & M. P. Steamboat Co. v. Farmers' Transp. Co., 18 N. J. Eq. 13, 511; Babcock v. New Jersey Stock Yard Co. 20 N. J. Eq. 296; New York & Harlan R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385, 1 Keener's Cas. 539; State v. Kerbs, 64 N. C. 604; Moyer v. Pennsylvania Slate Co., 71 Pa. St. 293; Farnsworth v. Goodhue, 48 Vt. 209.

[46] Jefferson Branch Bank v. Skelly, 1 Black. (U. S.) 436; Delaware Railroad Tax Case. 18 Wall. (U. S.) 206; Chesapeake & Ohio Ry. Co. v. Miller, 114 U. S. 176; Baltimore & Ohio R. Co. v. Marshall County Sup'rs, 3 W. Va. 319; Wilmington

ileges,[47] or the power of eminent domain,[48] or the right of exemption from the laws relating to usury.[49]

In a leading English case it was said in reference to a canal company: "The canal having been made under the provisions of an act of parliament, the rights of the plaintiffs are derived entirely from the act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act."[50] In this country the cases are to the same effect.

"Every power," said the supreme court of Illinois in a late case, "that is not clearly granted (to a corporation) is withheld, and any ambiguity in the terms of the grant must operate against the corporation and in favor of the public."[51] And in

& Weldon R. Co. v. Reid, 64 N. C. 226. See post, § 299.

[47] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. (U. S.) 420, 1 Smith's Cas. 157, 1 Cum. Cas. 506; Stein v. Bienville Water Supply Co., 141 U. S. 67; Parrott v. City of Lawrence, 2 Dill. 332, Fed. Cas. No. 10,772, 1 Smith's Cas. 175; Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala. 465, 58 Am. Rep. 615; Hooker v. New Haven & Northhampton Co., 15 Conn. 312; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369; Pratt v. Atlantic & St. Lawrence R. Co., 42 Me. 579; Rockland Water Co. v. Camden & Rockland Water Co., 80 Me. 544; Gaines v. Coates, 51 Miss. 335; De Lancey v. Rockingham Farmers' Mutual Fire Ins. Co., 52 N. H. 581; Auburn & Cato Plank Road Co. v. Douglass, 9 N. Y. 444; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167; Mohawk Bridge Co. v. Utica & Schenectady R. Co., 6 Paige (N. Y.) 554; Bennett's Branch Imp. Co.'s Appeal, 65 Pa. St. 242; Tuckahoe Canal Co. v. Tuckahoe & James River R. Co., 11 Leigh (Va.) 43, 36 Am. Dec. 374; Isham v. Bennington Iron Co., 19 Vt. 248; Appeal of Scranton Electric Light & Heat Co., 122 Pa. St. 154, 9 Am. St. Rep. 79; Emerson v. Com., 108 Pa. St. 111. And see post, § 271(b).

[48] Thatcher v. Dartmouth Bridge Co., 18 Pick. (Mass.) 501; New York & Harlem R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Moorhead v. Little Miami R. Co., 17 Ohio, 340; City of East St. Louis v. St. John, 47 Ill. 463; Hannibal Bridge Co. v. Schaubaker, 49 Mo. 555.

[49] Johnson v. Griffin Banking & Trust Co., 55 Ga. 691; Tyng v. Commercial Warehouse Co., 58 N. Y. 308; Houser v. Hermann Bldg. Ass'n, 41 Pa. St. 478.

[50] Proprietors of Stourbridge Canal v. Wheeley, 2 Barn. & Adol. 792, 1 Cum. Cas. 298.

[51] American Loan & Trust Co. v.

a Pennsylvania case it was said: "In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference."[52] In the supreme court of the United States it was said: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."[53]

The rule requiring a strict construction of charters has been held not to be applicable when a corporation or its members are seeking to evade a liability by giving a narrow and restricted meaning to words.[54] And it should never be applied if it would defeat the evident intention of the legislature.[55] As will be seen in a subsequent paragraph, the construction of a charter should always be reasonable, and so as to uphold, rather than defeat, the grant.

Minnesota & Northwestern R. Co., 157 Ill. 641.

[52] Pennsylvania R. Co. v. Canal Commissioners, 21 Pa. St. 22.

[53] Mr. Justice Swayne in Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U. S. 659.

[54] Gaff v. Flesher, 33 Ohio St. 114; Chicago, Rock Island & Pac. Ry. Co. v. Union Pac. Ry. Co., 47 Fed. 22; Tod v. Kentucky Union Land Co., 57 Fed. 53.

[55] Whitaker v. Delaware & Hudson Canal Co., 87 Pa. St. 34, 1 Smith's Cas. 155.

In a case in the supreme court of the United States it was said: "A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the Charles River bridge, the rules of construction known to the English

—(3) **Enumeration of certain powers as an exclusion of others.**—It is a general rule that, when the charter of a corporation enumerates certain powers as thereby conferred upon the corporation, it is to be construed as excluding or withholding all other powers than those enumerated, and such incidental powers as are reasonably necessary to the proper exercise thereof. This rule is expressed in the maxim, *expressio unius est exclusio alterius.* Thus, if a charter or general law in terms gives a corporation power to hold land for certain enumerated purposes, or to lend money on or invest in certain enumerated securities, it impliedly excludes all other purposes or securities, as the case may be.[56]

—(4) **Miscellaneous other rules.**—In construing a charter or general incorporation law for the purpose of determining the intention of the legislature, the act must be construed as a whole, and, if possible, all parts of it must be harmonized.[57]

common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the state, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several states are nearly all the same way. The principle is this: that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubt arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts." Per Mr. Justice Davis, in The Binghamton Bridge (Chenango Bridge Co. v. Binghamtom Bridge Co.) 3 Wall. (U. S.) 51, 1 Smith's Cas. 170.

[56] Case v. Kelly, 133 U. S. 21, 1 Keener's Cas. 589, 1 Smith's Cas. 405, 1 Cum. Cas. 106; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. (N. Y.) 31; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; Perrine v. Chesapeake & Delaware Canal Co., 9 How. (U. S.) 172; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557; New York Firemen Ins. Co. v. Ely, 5 Conn. 572, 13 Am. Dec. 100; New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; Talmage v. Pell, 7 N. Y. 328; State v. Atchison & Nebraska R. Co., 24 Neb. 143, 8 Am. St. Rep. 164.

[57] Belleville & Illinoistown R. Co. v. Gregory, 15 Ill. 23, 58 Am. Dec.

The construction should always be reasonable.[58] And, if possible, it should be such as to uphold the act as constitutional,[59] and to render it not contrary to general public policy.[60]

Words should be given their ordinary meaning,[61] unless they have acquired a different meaning by custom or usage,[62] or unless the context shows that they were used in a different sense. General words may be restricted in their meaning by specific words preceding,[63] and such words are always to be construed

589; Straus v. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 61; Bennett's Branch Imp. Co.'s Appeal, 65 Pa. St. 242.

[58] Attorney General v. Great Eastern Ry. Co., 5 App. Cas. 473, 11 Ch. Div. 449, 1 Keener's Cas. 479; Clark v. Farrington, 11 Wis. 306; State v. Florida Cent. R. Co., 15 Fla. 699; Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514; Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 401. See, also, Powell v. Sammons, 31 Ala. 552; Talladega Ins. Co. v. Landers, 43 Ala. 115; City of Baltimore v. Baltimore & Ohio R. Co., 21 Md. 50; State v. Passaic Turnpike Co., 27 N. J. Law, 217; Talcott Mountain Turnpike Co. v. Marshall, 11 Conn. 185; Port of Mobile v. Louisville & Nashville R. Co., 84 Ala. 115, 5 Am. St. Rep. 342; Brown v. Susquehanna Boom Co., 109 Pa. St. 68, 68 Am. Rep. 708; West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co., 121 Pa. St. 143, 6 Am. St. Rep. 766; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112, 84 Am. Dec. 527.

[59] Citizens' St. Ry. Co. v. Jones, 34 Fed. 579; Farnum v. Blackstone Canal Corp., 1 Sumn. 46, Fed. Cas. No. 4,675; City of Baltimore v. Baltimore & Ohio R. Co., 21 Md. 50.

[60] Jersey City Gaslight Co. v. Consumers' Gas Co., 40 N. J. Eq. 427.

[61] Riker v. Leo, 133 N. Y. 519; Fairchild v. Masonic Hall Ass'n, 71 Mo. 526.

Thus, where a charter in terms gives the corporation "perpetual succession," the words are to be taken in their ordinary meaning, and the corporation has the right to exist forever. Fairchild v. Masonic Hall Ass'n, 71 Mo. 526.

[62] Dexter Lime-Rock Co. v. Dexter, 6 R. I. 353.

[63] Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557; State v. International Inv. Co., 88 Wis. 512.

Thus, in the case first cited, where a charter authorized a corporation to carry on the business "of mechanical engineers and general contractors," it was held that the words "and general contractors" were not to be taken in their widest sense, but were restricted by the words preceding them, and that they authorized the corporation, therefore, to enter into such contracts only as are usually entered into in the business of mechanical engineers. It was also held in this case that authority given by the charter "to purchase, lease, work, and sell mines, minerals, land, and buildings," meant such land and buildings only as might be acquired for the purpose of purchasing, leasing, working, and selling mines and minerals, as the words "lands, and buildings" were restricted in their meaning by the words preceding them. Compare Brown v. Corbin, 40 Minn. 508; State v. Corkins, 123 Mo. 56; National Bank of Jefferson v. Texas Inv. Co., 74 Tex. 421; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834.

as merely auxiliary to the primary objects for which the corporation was created, unless a contrary intention appears.[64]

If the meaning of provisos or exceptions in the statute is clear, they must be given effect, even though the result may be to defeat the grant.[65] But they should not be so construed if the language reasonably admits of any other construction.[66]

——**(5) Directory provisions.**—Sometimes provisions in the charter of a corporation or articles of association are intended merely as directory to its officers, and in such a case they do not limit or affect the powers of the corporation. Thus, where the deed of settlement of an insurance company provided that the seal of the company should not be affixed to any policy except by the order of three of the directors, signed by them and countersigned by the manager, it was held that the provision was merely directory to the officers, and that a policy to which

[64] In re German Date Coffee Co., 20 Ch. Div. 169; Lusk v. Lewis, 32 Miss. 297.

[65] Talmadge v. North American Coal & Transp. Co., 3 Head (Tenn.) 337.

The general principle that a proviso or saving clause in a statute, which is directly repugnant to the body of the act, will not have effect to defeat the purpose of the enactment, does not apply in construing the charters of private corporations, where the matters contained in the proviso or saving clause are made, and intended to be made, an essential condition of the enjoyment of the charter. "If private corporations accept charters under such circumstances, they take them cum onere; they must enjoy their privileges subject to the conditions, or not enjoy them at all." West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co., 121 Pa. St. 143, 6 Am. St. Rep. 766.

[66] Whitaker v. Delaware & Hudson Canal Co., 87 Pa. St. 34, 1 Smith's Cas. 155; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co., 121 Pa. St. 159, 6 Am. St. Rep. 769; Talladega Ins. Co. v. Landers, 43 Ala. 115; Town of Lebanon v. Olcott, 1 N. H. 343.

This applies with peculiar force to quasi public corporations (ante, § 31[c]), which are intended to serve the interests of the public, as well as the private interests of themselves. Speaking of the charter of a boom company, it was said in a Pennsylvania case: "It is doubtless true that such charters are to be construed most beneficially for the public, and more strictly against the company, but the construction must be a reasonable one. The charters of most private corporations are for the purpose of private gain, and many of them grant exclusive privileges in abridgment of individual right, but as they are intended also to subserve great public interests they should be so construed as not to defeat the purpose of their creation." Brown v. Susquehanna Boom Co., 109 Pa. St. 68, 58 Am. Rep. 708. And see West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co., 121 Pa. St. 143, 6 Am. St. Rep. 766.

the seal was affixed without such an order was valid and binding upon the company.[67]

——**(6) Application of general laws to corporations.**—Provided no constitutional provision is in the way, the legislature may exempt corporations, or particular corporations, from the operation of general laws and police regulations, and constitutional acts of incorporation, general or special, will repeal as to corporations created by or under them, or render inapplicable to such corporations, any general laws or police regulations which are inconsistent therewith.[68]

A charter, however, whether consisting of a special act or a general statute, is not to be construed as exempting a corporation from the operation of general laws and police regulations which apply to persons generally throughout the state, unless such an intention on the part of the legislature is clear beyond any reasonable doubt.[69] Thus, generally, corporations authorized to lend money are within the laws relating to usury.[70] Corporations are also within statutes prohibiting the exercise of banking privileges without special legislative sanction.[71] And they are within the operation of common-law principles and statutes in relation to nuisances, both public and private,[72]

[67] Prince of Wales Life & Educational Assur. Co. v. Harding, El., Bl. & El. 183. See, also, Bank of United States v. Danbridge, 12 Wheat. (U. S.) 64; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; Southern Life Insurance & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; Sherman Center Town Co. v. Morris, 43 Kan. 282, 19 Am. St. Rep. 134; Proprietors of Middle Bridge v. Brooks, 13 Me. 391, 29 Am. Dec. 510. And see post, § 192(g)(5).

[68] See State v. Stoll, 17 Wall. (U. S.) 436; Howland v. Myer, 3 N. Y. 290; Wood v. Wellington, 30 N. Y. 218.

[69] French v. Connecticut River Lumber Co., 145 Mass. 261; Burbank v. Bethel Steam Mill Co., 75 Me. 373; Eastman v. Amoskeag Mfg. Co., 44 N. H. 160, 82 Am. Dec. 201; Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U. S. 659; Wiggins Ferry Co. v. City of East St. Louis, 102 Ill. 560; Tyng v. Commercial Warehouse Co., 58 N. Y. 308. See, also, Talmage v. Pell, 7 N. Y. 340; State Bank v. Cape Fear Bank, 13 Ired. (N. C.) 75; Mabire v. New Orleans Canal Bank, 11 La. 83, 30 Am. Dec. 710; Richmond, Fredericksburg & P. R. Co. v. City of Richmond, 26 Grat. (Va.) 83; Knights of Pythias v. Weller, 93 Va. 605.

[70] Philadelphia Loan Co. v. Towner, 13 Conn. 249; Johnson v. Griffin Banking & Trust Co., 55 Ga. 691.

[71] People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

[72] Northwestern Fertilizing Co.

and criminal offenses,[73] unless they are expressly excluded, or unless the law is inapplicable to them in its reason or purpose.[74]

§ 128. Powers impliedly conferred—(a) In general.—The charter of a corporation may confer powers upon it either expressly or impliedly. In addition to the powers expressly conferred, and in the absence of express or implied prohibition—

(1) A corporation has, by implication, certain powers which are regarded as incidental to corporate existence These are:

(a) The power or faculty of perpetual succession, or continuous existence during the period for which it is created.

(b) The power to sue and be sued, and to grant and receive, by its corporate name.

(c) The power to take, hold, and convey land and chattels for purposes which are not foreign to the objects of its creation.

(d) The power to have a corporate seal.

(e) The power to make by-laws for its government.

(f) The power of disfranchisement or removal of members.

(2) In addition to these powers, a corporation has the implied power to make all contracts and do all acts which are reasonably necessary to enable it to exercise the powers expressly conferred, and accomplish the objects for which it was created.

(b) Powers incident to corporate existence.—It has long been settled that the powers of a corporation are not limited to such as are expressly conferred upon it by its charter. Indeed no particular powers need be conferred in express terms. The mere creation of a corporation is alone sufficient, in the absence of a prohibition, to confer upon it all those powers which are regarded as incident to corporate existence.[75] The powers which are thus impliedly conferred, and which will be sepa-

v. Village of Hyde Park, 97 U. S. 659; Snell v. Buresh, 123 Ill. 151; Burbank v. Bethel Steam Mill Co., 75 Me. 373; Eastman v. Amoskeag Mfg. Co., 44 N. H. 160, 82 Am. Dec. 201; Renwick v. Morris, 7 Hill (N. Y.) 575.

[73] State v. Krebs, 64 N. C. 604; post, § 246.

[74] See, generally, ante, § 24.

[75] Sutton's Hospital Case, 10 Coke, 23a; Conservators of River Tone v. Ash, 10 Barn. & C. 349, 1 Cum. Cas. 23.

rately considered hereafter, are: First, the power to have succession, so that the corporation will continue to exist as the same legal entity, notwithstanding the death or withdrawal of members;[76] second, the power to sue and be sued, and to grant and receive, in the corporate name;[77] third, the power to purchase, hold, and convey real and personal property for such purposes as are within the objects of its creation;[78] fourth, the power to have a common seal;[79] fifth, the power to make by-laws for its government;[80] and, sixth, the power, in the proper cases, to disfranchise or remove members.[81]

(c) Powers implied from powers expressly granted—(1) In general.—In addition to the powers above enumerated, powers are also implied as incidental to the particular corporation, because they are necessary to enable it to properly exercise the powers which are expressly granted, and to accomplish the objects for which it is created. The general rule is that the charter of a corporation impliedly confers upon it the power to make all contracts and to do all acts which are reasonably necessary to enable it to accomplish the objects of its creation.[82]

[76] Post, § 305.

[77] Sutton's Hospital Case, 10 Coke, 23a; Conservators of River Tone v. Ash, 10 Barn. & C. 349, 1 Cum. Cas. 23; post, § 258.

[78] Sutton's Hospital Case, 10 Coke, 23a; post, §§ 132 et seq., 152 et seq.

[79] Sutton's Hospital Case, 10 Coke, 23a; post, § 192(b).

[80] Sutton's Hospital Case, 10 Coke, 23a; post, chapter xxiv.

[81] Post, § 373.

[82] Simpson v. Directors of Westminster Palace Hotel Co., 8 H. L. Cas. 712; Attorney General v. Great Eastern Ry. Co., 5 App. Cas. 473; Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 385; Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 621; Hope Mutual Life Ins. Co. v. Weed, 28 Conn. 51; Toledo, Wabash & W. Ry. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234; Home Ins. Co. v. Northwestern Packet Co., 32 Iowa, 223, 7 Am. Rep. 183; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326, 1 Keener's Cas. 472; Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315, 1 Keener's Cas. 477; Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212; Smith v. Nashua & Lowell R. Co., 27 N. H. 94, 59 Am. Dec. 364; Attorney General v. Stevens, 1 N. J. Eq. 370, 22 Am. Dec. 526; Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; McCraith v. National Mohawk Valley Bank, 104 N. Y. 414; Moss v. Averell, 10 N. Y. 455; White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co., 12 Ohio St. 601; Watt's Appeal, 78 Pa. St. 370; Malone v. Lancaster Gas Light & Fuel Co., 182 Pa. St. 309;

As was said in a Connecticut case: "While a corporation has no powers except those which are conferred by its charter, it is not requisite that those powers should be expressly granted, but it possesses impliedly and incidentally all such powers as are necessary for the purpose of carrying into effect those which are expressly granted. The creation of a corporation for a specified purpose implies a power to use the means necessary to effect that purpose."[83] In a Massachusetts case it was said: "We know of no rule or principle by which an act creating a corporation for certain specific objects or to carry on a particular trade or business is to be strictly construed, as prohibitory of all other dealings or transactions, not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."[84] "A corporation in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends."[85]

——**(2) Relation between the act and the objects of the corporation.**—In order that a corporation may have the implied power to do a particular act, the act must be directly and immediately appropriate to the execution of the specific powers granted by the charter, and not bear merely a slight or remote

Union Bank v. Jacobs, 6 Humph. (Tenn.) 515, 1 Smith's Cas. 200, 1 Cum. Cas. 302; Clark v. Farrington, 11 Wis. 306.

See, also, Bates v. Coronado Beach Co., 109 Cal. 160, 1 Keener's Cas. 683; Leslie v. Lorillard, 110 N. Y. 519, 1 Keener's Cas. 465.

[83] Hope Mutual Life Ins. Co. v. Weed, 28 Conn. 51, 63.

[84] Brown v. Winnisimmet Co., 11 Allen (Mass.) 326, 334, 1 Keener's Cas. 472.

[85] Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 289.

"A corporation, like a natural person, has a right to conduct its legitimate business by all the means necessary to effect such object. Within its prescribed range it can do whatever a natural person, mutatis mutandis, could do." Killingsworth v. Portland Trust Co., 18 Or. 351, 17 Am. St. Rep. 737.

relation to them.[86] In a late Illinois case it was said: "Corporations possess what are known as 'incidental powers,' but incidental powers are such as are necessary in order to enable a corporation to carry into execution the specific powers conferred upon it by its charter. Implied powers exist only to enable a corporation to carry out the express powers granted,—that is, to accomplish the purpose of its existence,—and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary,—that is, needful, suitable, and proper to accomplish the object of the grant,—and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation."*

It is not necessary, however, that the act shall be usual under the circumstances. Nor need it be necessary in the sense of indispensable. All that is required is that it shall be reasonably appropriate and convenient.[87]

"Power necessary to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers

[86] People v. Chicago Gas Trust Co., 130 Ill. 283, 17 Am. St. Rep. 319, 2 Smith's Cas. 952; Buffett v. Troy & Boston R. Co., 40 N. Y. 176; Franklin Co. v. Lewiston Institution for Savings, 68 Me. 45, 28 Am. Rep. 9, 1 Keener's Cas. 504, 1 Cum. Cas. 343; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334; People v. Pullman's Palace Car Co., 175 Ill. 125; First M. E. Church of Chicago v. Dixon, 178 Ill. 260.

* First M. E. Church of Chicago v. Dixon, 178 Ill. 260; People v. Pullman's Palace Car Co., 175 Ill. 125.

[87] Madison, W. & M. Plankroad Co. v. Watertown & P. Plankroad Co., 5 Wis. 173; Clark v. Farrington, 11 Wis. 306; Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co., 60 Ohio St. 96.

Acts of a corporation which, if standing alone, or engaged in as a business, would be beyond its implied powers, are not ultra vires when they are incidental to, or form a part of, an entire transaction, which, in its general scope, is within the purpose of the corporation. Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co., 60 Ohio St. 96.

which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such, in similar cases, has never been the legal acceptation of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted, has always been deemed a necessary one. * * * The term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view, at the time of the enactment of the charter."[88] "It has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this, they must have a choice of means adapted to ends, and are not to be confined to any one mode of operation."[89]

As was stated in another section, the mere fact that a particular contract or transaction is beneficial to a corporation, and will increase its profits, does not bring it within its powers.[90]

——(3) **Presumption.**—When a question arises as to whether a particular act or contract is in excess of the powers of a corporation, and there might be circumstances under which it

[88] New Jersey Railroad & Transp. Co. v. Hancock, 35 N. J. Law, 545. See, also Madison, W. & M. Plankroad Co. v. Watertown & P. Plankroad Co., 5 Wis. 173; Clark v. Farrington, 11 Wis. 306; Malone v. Lancaster Gas Light & Fuel Co., 182 Pa. St. 309; Northside Ry. Co. v. Worthington, 88 Tex. 562; Central Gold Min. Co. v. Platt, 3 Daly (N. Y.) 263; Crawford v. Longstreet, 43 N. J. Law, 325, 1 Keener's Cas. 545.

[89] City of Bridgeport v. Housatonic R. Co., 15 Conn. 475.

The doctrine of ultra vires, said Lord Selborne, "ought to be reasonably, and not unreasonably, understood and applied, and whatever may fairly be regarded as incidental to, and consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires." Attorney General v. Great Eastern Ry. Co., 5 App. Cas. 473. And see Ellerman v. Chicago Junction Railways & Union Stockyards Co., 49 N. J. Eq. 217.

[90] Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Smith's Cas. 564, 1 Keener's Cas. 457, 1 Cum. Cas. 173; Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Cherokee Iron Co. v. Jones, 52 Ga. 276; ante, § 125.

would be authorized, it will be presumed to have been authorized unless the contrary appears, the burden of showing the contrary being upon the one who sets up the want of power. This rule is based upon the maxim, *omnia acta rite esse praesumuntur*.[91]

(d) Illustrations of implied powers—(1) In general.—While a corporation created for the purpose of carrying on a particular kind of business only cannot lawfully engage in an entirely different business,[92] it may engage in any business which is reasonably necessary or incidental to the business expressly authorized.[93]

——(2) Manufacturing and trading companies.—As we have seen, a manufacturing company cannot engage in buying and selling goods, where such business is not necessary or incidental to its manufacturing business.[94] It is otherwise, however, when it is necessary or incidental. Thus it has been held that a corporation authorized to operate an iron furnace may keep a supply store, when such a store is reasonably necessary in carrying on the business of an iron furnace.[95] And it has been held that a corporation for the purpose of "manufacturing and selling glass" may lawfully purchase manufactured glass from another manufacturer for the purpose of keeping up its stock and supplying its customers while its factory is being repaired.[96]

[91] Scottish North Eastern Ry. Co. v. Stewart, 3 Macq. H. L. Cas. 382; Alabama Gold Life Ins. Co. v. Central Agric. & Mech. Ass'n, 54 Ala. 73; Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Smith's Cas. 148, 1 Cum. Cas. 148; McIntire v. Preston, 10 Ill. 48, 48 Am. Dec. 321; Harrison Wire Co. v. Moore, 55 Mich. 610; Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; De Groff v. American Linen Thread Co., 21 N. Y. 127; International Building & Loan Ass'n, No. 2, v. Wall, 153 Ind. 554; West v. Averill Grocery Co., 109 Iowa, 488.

[92] Ante, §§ 123-126.

[93] Flanagan v. Great Western Ry. Co., L. R. 7 Eq. 116; Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514; Wheeler v. San Francisco & Alameda R. Co., 31 Cal. 46, 89 Am. Dec. 147; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326, 1 Keener's Cas. 472; Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315, 1 Keener's Cas. 477; Malone v. Lancaster Gas Light & Fuel Co., 182 Pa. St. 309; Searight v. Payne, 6 Lea (Tenn.) 283; Dauchy v. Brown, 24 Vt. 197.

[94] Ante, § 126(a).

[95] Searight v. Payne. 6 Lea (Tenn.) 283. And see Dauchy v. Brown, 24 Vt. 197.

[96] Lyndeborough Glass Co. v.

It has also been held that a gas company may incidentally deal in such patented gas fixtures and appliances as will induce new customers to use gas, or old customers to use more;[97] and that a brewing company may lease, or lease and sublet, premises for the purpose of a saloon, in order to increase the sale of its beer.[98]

——(3) **Railroad companies.**—As a rule, a railroad company, as we have seen, cannot engage in operating a line of boats beyond the terminus of its road, even though by doing so it may increase the business over its road.[99] But a railroad company may lawfully own boats for the purpose of transporting freight or passengers across navigable waters on its line, or across such waters at the end of its road and separating it from the substantial terminus.[100] It has also been held that a railroad company may lawfully establish and maintain refreshment houses along its route for the accommodation of its passengers.[101] The supreme court of the United States held in a late case that a corporation operating a railroad in Florida could lease and maintain a hotel at the terminus of its road on a beach distant from any town,[102] but the soundness of this decision may well be doubted. A railroad company may make necessary arrangements for conveying baggage or freight to and from its stations or depots, either by employing others or by running wagons itself.[103]

——(4) **Mining companies.**—A corporation organized for the

Massachusetts Glass Co., 111 Mass. 315, 1 Keener's Cas. 477. And see Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128; Hawkes Glass Beveling & Silvering Co. v. Bohn Mfg. Co., 40 Ill. App. 649.

[97] Malone v. Lancaster Gas Light & Fuel Co., 182 Pa. St. 309.

[98] Helms Brewing Co. v. Flannery, 38 Ill. App. 95, 137 Ill. 309; National Brewing Co. v. Ahlgren, 63 Ill. App. 475; Keeley Brewing Co. v. Emrick, 64 Ill. App. 247; Welsh v. Ferd Helm Brewing Co., 47 Mo. App. 608.

[99] Ante, § 126(b).

[100] Wheeler v. San Francisco & Alameda R. Co., 31 Cal. 46, 89 Am. Dec. 147. And see South Wales Ry. Co. v. Redmond, 10 C. B. (N. S.) 675; Shawmut Bank v. Plattsburgh & Montreal R. Co., 31 Vt. 491; Green Bay & Minnesota R. Co. v. Union Steamboat Co., 107 U. S. 98.

[101] Flanagan v. Great Western Ry. Co., L. R. 7 Eq. 116.

[102] Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514.

[103] Attorney General v. Grand Trunk Ry. Co., 16 Low. Can. Rep. 91; Camblos v. Philadelphia & Reading R. Co., 4 Brewst. (Pa.) 563.

purpose of mining, only, cannot establish a railroad or steamboat line and engage in transporting the goods of others for hire; but it may lawfully make any necessary arrangements for the purpose of conveying its own coal or ore to the market or to a smelter, even though it may involve the operation of a railroad for the purpose, or the purchase and use of a steamboat.[104]

——**(5) Improvement and development of land.**—If a corporation is authorized by its charter to buy, sell, and improve or develop land, it may lawfully adopt any means that may be necessary or proper in order to accomplish this purpose. Thus, it may build and maintain sawmills if the land is timber land;[105] or, in order to enhance the value and salability of the land and add to its settlement, it may build a hotel or college,[106] or aid, by subscription or otherwise, in building a railroad.[107]

——**(6) Use of surplus or idle property.**—If the business of a corporation is such as to render it necessary for it to own a certain kind of property, and at times such property is not necessary to its business, it may employ the same in a business or for a purpose which is not strictly within the objects of its creation, in order to prevent the same from remaining idle and unprofitable.[108]

Thus, a railroad company which owns steamboats for use in

[104] Moss v. Averell, 10 N. Y. 455; Callaway Min. & Mfg. Co. v. Clark, 32 Mo. 305.

[105] Watts' Appeal, 78 Pa. St. 370.

[106] Watts' Appeal, 78 Pa. St. 370; Fulton v. Sterling Land & Inv. Co., 47 Kan. 621; Whetstone v. Ottawa University, 13 Kan. 320; Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128.

[107] Louisville & Nashville R. Co. v. St. Rose Literary Soc., 91 Ky. 395.

[108] Forrest v. Manchester, Sheffield & L. Ry. Co., 30 Beav. 40; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326, 1 Keener's Cas. 472; Union Pac. Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co. (C. C. A.) 51 Fed. 309, 1 Keener's Cas. 635; People v. Pullman's Palace Car Co., 175 Ill. 125; Benton v. City of Elizabeth, 61 N. J. Law, 411, 693. And see post, § 153.

Where a corporation chartered for the manufacture of railway cars, in erecting its plant, constructed larger boilers than were then necessary, but such as would be necessary to supply its needs in the future, it was held that it was not ultra vires for it to sell and furnish its surplus steam power to another company. People v. Pullman's Palace Car Co., 175 Ill. 125.

On the same principle, a railroad company or other corporation, owning the fee in land, may grant an easement therein to another,—as for the laying of pipes, for example,—if the easement

connection with its road may use them for excursions, instead of allowing them to lie idle, at times when they are not needed for their ordinary purposes.[109] A ferry company may, under similar circumstances, temporarily use its boats for other than ordinary purposes, or charter them to others, if they would otherwise remain idle.[110] And in like manner a hotel company or other corporation, whose buildings are larger than its present necessities require, may lease a portion until needed for its business.[111]

§ 129. Mode of exercising powers.

If the charter of a corporation prescribes no particular mode for the exercise of its powers, they may be exercised in any mode, provided it is not contrary to law, which the stockholders or officers may deem best.[112] But if the charter requires its powers to be exercised in any particular manner, or by particular officers or agents, they cannot be properly exercised in any other way, for the powers of a corporation are measured by its charter, not only as to the things which it may lawfully do, but also as to the mode of doing them.[113] As we shall see, however, in treating of the effect of *ultra vires* transactions, the fact that a corporation exercises a power in a mode different from that prescribed by its charter will not necessarily

does not interfere with the ability of the corporation to perform its duties to the public. Benton v. City of Elizabeth, 61 N. J. Law, 411, 693. See post, § 155.

In like manner, a railroad company may let another company into the joint use and occupancy of its bridge, depots, tracks, and other terminal facilities. Union Pac. Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co. (C. C. A.) 51 Fed. 309, 1 Keener's Cas. 635. See post, § 153.

[109] Forrest v. Manchester, Sheffield & L. Ry. Co., 30 Beav. 40.

[110] Brown v. Winnisimmet Co., 11 Allen (Mass.) 326, 1 Keener's Cas. 472.

[111] Simpson v. Directors of Westminster Palace Hotel Co., 8 H. L. Cas. 712; People v. Pullman's Palace Car Co., 175 Ill. 125. And see post, § 153.

[112] Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

[113] Beatty v. Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; Fridley v. Bowen, 87 Ill. 151; Pennsylvania Lightning Rod Co. v. Board of Education of Cass Tp., 20 W. Va. 360; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64; Hosack v. College of Physicians & Surgeons, 5 Wend. (N. Y.) 547; Bartholomew v. Bentley, 1 Ohio St. 37; Talmadge v. North American Coal & Transp. Co., 3 Head (Tenn.) 337.

prevent it from acquiring rights or incurring liabilities by reason thereof.[114]

§ 130. Time of exercising powers.

If the charter of a corporation prescribes conditions precedent to the right to exercise the powers conferred upon it, it cannot lawfully exercise such powers until these conditions are fulfilled.[115] This is true, for example, of national banks, which are prohibited by the national bank act from transacting any business, except such as is incidental and necessarily preliminary to their organization, until certain conditions have been complied with, and the comptroller of the currency has authorized them to commence business.[116] A corporation must also exercise its powers within the time, if any, fixed by its charter.[117] As was shown in a former chapter, an association cannot exercise corporate powers and franchises until it has acquired, at the least, a *de facto* corporate existence.[118]

§ 131. Place of exercising powers.

(a) In general.—If there are no express or implied restrictions in its charter, a corporation may locate and carry on its business at any place within the state.[119] It cannot do so, however, if its charter requires that it shall be located and conduct its operations at a particular place within the state, as in the case of a bank, hospital, college, etc.[120]

Where a private act creating a corporation was entitled "An act to incorporate the Institution of Protestant Deaconesses, and

[114] See post, § 221.

[115] McCormick v. Market Nat. Bank of Chicago, 165 U. S. 538, affirming 162 Ill. 100; Bonham v. Taylor, 10 Ohio, 108; Medill v. Collier, 16 Ohio St. 599.

[116] McCormick v. Market Nat. Bank of Chicago, 165 U. S. 538, affirming 162 Ill. 100.

[117] Town of Williamsport v. Kent, 14 Ind. 309.

[118] Ante, § 99 et seq.

[119] Ashley Wire Co. v. Illinois Steel Co., 60 Ill. App. 179; City Bank of Columbus v. Beach, 1 Blatchf. 425, Fed. Cas. No. 2,736; Stickle v. Liberty Cycle Co. (N. J. Eq.) 32 Atl. 708.

[120] Attorney General v. Oakland County Bank, Walk. (Mich.) 90; Underwood v. Waldron, 12 Mich. 73; People v. Protestant Deaconesses Inst., 71 Ill. 229; People v. Trustees of Geneva College, 5 Wend. (N. Y.) 211; Berthin v. Crescent City Live-Stock Landing & Slaughter-House Co., 28 La. Ann. 210.

to provide for the encouragement and control of an hospital in Chicago," and provided for the establishing of such a hospital in Chicago, and then in general terms authorized the corporation to establish, regulate, and control any hospital, infants' home, insane asylum, or school necessary and proper for carrying out the general objects of the act, it was held that the corporation had no authority to establish or maintain schools, hospitals, or asylums outside of the city of Chicago.[121]

So, where a corporation was required by its charter, as a condition to the exercise of its franchises, to locate and maintain a slaughterhouse for the use of all the butchers of a certain city, who were forbidden to ply their vocation at any other place, for the purpose of protecting the health of the city, it was held that the corporation, after establishing a slaughterhouse, could not change its location, and compel the butchers to follow it to some other locality.[122]

A requirement that a corporation shall be located and conduct its operations at a particular place has reference to the general business, only, of the corporation and does not prohibit an isolated or incidental transaction at another place. Thus, a bank, although required by its charter to conduct its business in a particular city, may nevertheless discount a note at another place for the purpose of securing a demand.[123]

The main purpose of an educational corporation must be carried on at the place where it is established, but the incidental powers which are necessary for the maintenance of the corporation may be exercised elsewhere. Thus, the power to receive gifts of money and other property for the purpose of maintaining an academy, and to hold and convey property for such purpose, may be exercised anywhere, unaffected by the restriction as to the location of the academy.[124]

(b) **Power to act in other states.**—As we shall see more at

[121] People v. Protestant Deaconesses Inst., 71 Ill. 229.

[122] Berthin v. Crescent City Live-Stock Landing & Slaughter-House Co., 28 La. Ann. 210.

[123] Potter v. Bank of Ithaca, 5 Hill (N. Y.) 490.

[124] Saint Clara Female Academy v. Sullivan, 116 Ill. 375, 56 Am. Rep. 776.

length in another chapter, a corporation may, like a natural person, carry on business and make contracts, through its agents, in another state or country than that by or under whose laws it was created, provided the other state or country expressly or impliedly consents, and provided there is no restriction in its charter.[125] A corporation, however, since it is a mere creature of the law, and since the laws of particular states or countries have no force beyond their territorial limits, can have no *existence* in a foreign state or country. "It must dwell in the place of its creation, and cannot migrate to another sovereignty."[126] And it follows that a corporation cannot *itself* act in another state or country. In other words, a corporation cannot, in a sovereignty other than that of its own creation, do any act which cannot be done through the intervention of a mere agent, but which is, in contemplation of law, the direct act of the corporate body itself.[127]

It is, of course, entirely within the power of the legislature, in creating a corporation, to place restrictions upon its power to act, even through mere agents, outside of the state, and if it disregards such restrictions, it violates its charter and acts *ultra vires*. Thus, under a New Jersey statute authorizing any corporation under a general law to carry on part of its business out of the state, provided the certificate of incorporation should state what part was to be so carried on, and the certificate of incorporation of a manufacturing corporation stated that the portion of its business to be carried on out of the state should be the selling of its manufactured products, it was held that it

[125] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Kennebec Co. v. Augusta Ins. & Banking Co., 6 Gray (Mass.) 204; Cary v. Cleveland & Toledo R. Co., 29 Barb. (N. Y.) 35. See post, chapter xxvi.

[126] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519.

[127] See Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619; Freeman v. Machias Water Power & Mill Co., 38 Me. 343; Smith v. Silver Valley Min. Co., 64 Md. 85, 54 Am. Rep. 760; Camp v. Byrne, 41 Mo. 525; Mitchell v. Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406; Tuckasegee Min. Co. v. Goodhue, 118 N. C. 981. And see ante, § 48(b); post, chapter xxvi.

had no authority to remove its manufacturing plant out of the state.[128]

The legislature may require a corporation to keep its officers, place of business, and books within the state, and such a requirement must be complied with. Where a statute provided that the secretary and treasurer of every domestic corporation should reside, have their place of business, and keep the books of the corporation within the state, it was held that it was not complied with by the residence within the state of a person who was nominally secretary and treasurer of the corporation, where the business of the corporation was transacted in another state, in which all of the corporate property was situated; and that a corporation thus conducting its business forfeited its charter.[129]

[128] Stickle v. Liberty Cycle Co. (N. J. Eq.) 32 Atl. 708.

[129] State v. Park & Nelson Lumber Co., 58 Minn. 330. See post, § 314(k).

CHAPTER VIII.

POWER TO TAKE AND HOLD PROPERTY.

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I. Power to Take and Hold Real Property.

§ 132. In general.—In the absence of prohibitions in its charter or in the constitution or general law, a corporation has the

power to take and hold real property whenever it is necessary or reasonably incidental to the business or objects authorized by its charter, but it cannot lawfully take and hold real property for a purpose which is foreign to the objects for which it was created.

Frequently, if not generally, the charter of a corporation confers upon it in express terms the power to acquire and hold real property, but an express grant of such power is not necessary.[1] Nothing is better settled in the law of corporations than that a corporation has the capacity and the implied power to take and hold real property in the corporate name, just as an individual may,[2] provided the purpose for which it is acquired and held it not inconsistent with the objects for which it was created,[3] and provided there are no constitutional or statutory prohibitions or restrictions in the way.[4]

In a Kentucky case it was said: "No doctrine of the common law is more clearly and undeniably established than that which concedes to corporations an inherent or resulting right to acquire and hold title to land by contract, except so far only as they may be restricted by the objects of their creation, or the limitations of their charters."[5]

A corporation, like a natural person, may acquire title by adverse possession.[6]

[1] A grant of power to a corporation to sell land to another corporation confers upon the latter the power to purchase and hold the land. Dewey v. Toledo, Ann Arbor & N. M. Ry. Co., 91 Mich. 351.

[2] Co. Litt. 44a, 300b; 1 Bl. Com. 478; Sutton's Hospital Case, 10 Coke, 23a, 30b; Nicoll v. New York & Erie R. Co., 12 N. Y. 121, 1 Smith's Cas. 181, 1 Keener's Cas. 515, 1 Cum. Cas. 73; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 1 Smith's Cas. 453, 1 Keener's Cas. 551, 1 Cum. Cas. 85; Lathrop v. Commercial Bank of Scioto, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Stockton Sav. Bank v. Staples, 98 Cal. 189, 1 Smith's Cas. 179; Inhabitants of Sutton v. Cole, 3 Pick. (Mass.) 232; Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Smith's Cas. 493, 1 Doug. (Mich.) 401, 41 Am. Dec. 575; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; Rives v. Dudley, 3 Jones Eq. (N. C.) 126, 67 Am. Dec. 231; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594; Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378, 1 Cum. Cas. 76; Rivanna Nav. Co. v. Dawsons, 3 Grat. (Va.) 19, 46 Am. Dec. 183. See, also, Freeman v. Sea View Hotel Co., 57 N. J. Eq. 68.

[3] Post, § 138.

[4] Post, § 142.

[5] Chief Justice Robertson, in Lathrop v. Commercial Bank of Scioto, 8 Dana (Ky.) 114, 33 Am. Dec. 481.

[6] Inhabitants of Rehoboth v. Catholic Congregational Church, 23 Pick. (Mass.) 139; Robie v. Sedgwick, 35 Barb. (N. Y.) 319.

§ 133. Fee-simple title.

It has been contended that a corporation cannot take and enjoy a title in fee simple, but only an estate for years, when the period of its existence is limited by its charter; but the contrary rule is well settled. Such a corporation cannot hold the title to land after the period of its existence has expired, but it may hold a fee simple for the purpose of alienation, and for the purpose of enjoyment during the period of its existence.[7]

"It is erroneous," it was said in a leading New York case, "to say that an estate in fee cannot be fully enjoyed by * * * a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized. It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient."[8]

The effect of dissolution will be shown in another chapter.[9]

§ 134. Tenancy in common and joint tenancy.

Since unity of possession only is necessary to a tenancy in common, a corporation may take and hold land as tenant in common with another.[10] But in the nature of things it cannot take and hold land in joint tenancy. For the creation of a joint tenancy there must be unity of interest, unity of title, unity of time, and unity of possession, and the distinguishing incident is the right of survivorship. "Two corporations,

[7] 2 Kent's Com. 282; Nicoll v. New York & Erie R. Co., 12 N. Y. 128, 1 Smith's Cas. 181, 1 Keener's Cas. 515, 1 Cum. Cas. 73; People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684; Yates v. Van De Bogert, 56 N. Y. 526; Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378, 1 Cum. Cas. 76; Rives v. Dudley, 3 Jones Eq. (N. C.) 126, 67 Am. Dec. 231; Asheville Division No. 15, Sons of Temperance, v. Aston, 92 N. C. 578; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594; Union Canal Co. v. Young, 1 Whart. (Pa.) 425, 30 Am. Dec. 212.

[8] Parker, J., in Nicoll v. New York & Erie R. Co., 12 N. Y. 128, 1 Smith's Cas. 181, 1 Keener's Cas. 515, 1 Cum. Cas. 73.

[9] Post, § 328.

[10] De Witt v. City of San Francisco, 2 Cal. 289; Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637; Estell v. University of the South, 12 Lea (Tenn.) 476.

therefore," said the California court, "cannot hold as joint tenants, because two of the essential unities are wanting, namely: of the same capacity and title. Nor can they hold as joint tenants, for another reason: being each perpetual, there can be no survivorship between them. * * * Nor can a corporation hold lands as joint tenant with a natural person, for there is no reciprocity or survivorship between them."[11]

§ 135. Authorized purposes in acquiring real property.

The general rule is that a corporation, in the absence of restrictions in its charter or the general law, has the implied power to acquire real property, by purchase or otherwise, and hold the same, whenever it is reasonably necessary or convenient to enable it to accomplish the objects for which it was created.[12] The property need not be necessary in the sense of indispensable, but it is sufficient if it is convenient and proper under the circumstances, and not inconsistent with the legitimate objects of the corporation.[13]

Illustrations.—Thus, where a corporation was authorized to purchase and hold real and personal property, and to devote

[11] De Witt v. City of San Francisco, 2 Cal. 297; Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637.

[12] Brown v. Hogg, 14 Ill. 219; Old Colony R. Corp. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; Richardson v. Massachusetts Charitable Mechanic Ass'n, 131 Mass. 174; Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; Morris & Essex R. Co. v. City of Newark, 10 N. J. Eq. 361; Moss v. Rossie Lead Min. Co., 5 Hill (N. Y.) 137; Moss v. McCullough, 7 Barb. (N. Y.) 279; Moss v. Averell, 10 N. Y. 449; Kelly v. People's Transp. Co., 3 Or. 189; Bank of Virginia v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

See, also, Freeman v. Sea View Hotel Co., 57 N. J. Eq. 68.

A manufacturing company, instead of incurring the delay and expense incident to the construction of a new manufacturing plant, and building up of an independent business, may purchase the plant and business of an existing partnership, engaged in a like business. Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co., 60 Ohio St. 96; post, § 147, note 95. And see ante, § 112.

[13] Ante, § 128(c)(2); Richardson v. Massachusetts Charitable Mechanic Ass'n, 131 Mass. 174; Bank of Virginia v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; Steinway v. Steinway & Sons, 17 Misc. Rep. (N. Y.) 43.

Land is necessary, in the sense in which the term is here used, if it is "obviously appropriate and convenient to carry into effect the franchise granted." New Jersey Railroad & Transportation Co. v. Hancock, 35 N. J. Law, 537, 545. And see ante, § 128(c)(2).

its income to charitable purposes, and to the promotion of inventions and improvements in the mechanic arts, by granting premiums for such inventions and improvements, it was held to have the power to purchase land and erect a building for the purpose of holding exhibitions and meetings.[14]

A manufacturing company may purchase land, not only for the purpose of erecting its factories, but also, if it is reasonably necessary, for the purpose of erecting dwellings for its employes.[15] And, generally, a corporation may purchase and hold land for the purpose of a place for conducting its business, instead of leasing a place, whatever may be the nature of its business.[16]

§ 136. Quantity of land.

When a corporation is expressly or impliedly given the power to purchase land for a particular purpose, or, generally, to accomplish the objects for which it was created, the quantity necessary to be acquired is within the reasonable discretion of the stockholders or directors.* For example, if a corporation is empowered to purchase land for the construction of a canal or railroad, the directors have a reasonable discretion as to the quantity necessary for this purpose, and are not restricted to the purchase of just so much as may be

[14] Richardson v. Massachusetts Charitable Mechanic Ass'n, 131 Mass. 174.

[15] Steinway v. Steinway & Sons, 17 Misc. Rep. (N. Y.) 43.

In a late Illinois case, however, it was held that a corporation for manufacturing purposes, authorized to purchase and hold such land as might be necessary for the prosecution of its business, could not purchase land for the purpose of erecting houses to be let to its employes. People v. Pullman's Palace Car Co., 175 Ill. 125. As to this case, see post, § 138, note 28.

[16] Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Bank of Virginia v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

* Spear v. Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; Bank of Virginia v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; People v. Pullman's Palace Car Co., 175 Ill. 125.

Where a corporation, requiring land for its legitimate purposes, in good faith purchases a larger tract than is needed, the transaction is not ultra vires, and it may afterwards sell the surplus. Lauder v. Peoria Agricultural & Trotting Soc., 71 Ill. App. 475.

necessary for the thread of the canal or the construction of the road.[17]

In an early Virginia case a banking corporation, authorized by its charter to acquire such real estate as might be necessary for its immediate accommodation, was held to have the power, in order to protect itself against fire, to purchase more land than was absolutely essential for the erection of a banking house, build fireproof houses thereon, and sell them to third persons.[18] And in a Vermont case a corporation owning a toll bridge was held to have the power to purchase and take from the owner of adjoining land a conveyance of the right to control all passage over the land for the purpose of avoiding passing over the bridge.[19]

A corporation created for the purpose of dealing in land has unlimited power to purchase, hold, and sell land, except in so far as there may be express statutory restrictions.[20]

A railroad company not only has the power to acquire such land as may be necessary for its road and stations, but it also has the power to acquire such as may be necessary or convenient for car and engine houses, water tanks, repair shops, coal and wood yards, sidings, and turnouts, etc.,[21] or for stock yards for cattle transported over its road,[22] or for dumping grounds for waste earth taken out in constructing its road,[23] or for procuring gravel, sand, or other material necessary in the construction of its road.[24]

It was held in a Massachusetts case that a railroad company

[17] Spear v. Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

[18] Bank of Virginia v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

[19] Proprietors of Claremont Bridge v. Royce, 42 Vt. 730.

[20] Market St. Ry. Co. v. Hellman, 109 Cal. 590.

[21] Pfaff v. Terre Haute & Indianapolis R. Co., 108 Ind. 144; Morris & Essex R. Co. v. City of Newark, 10 N. J. Eq. 361; Camden & A. Railroad & Transp. Co. v. Commissioners of Mansfield, 23 N. J. Law, 510; Cleveland & Pittsburg R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84; Toledo & Wabash Ry. Co. v. Daniels, 16 Ohio St. 390; New York & Harlem R. Co. v. Kip, 46 N. Y. 546, 1 Keener's Cas. 539.

[22] New York Cent. & Hudson River R. Co. v. Metropolitan Gas-Light Co., 63 N. Y. 326.

[23] Lodge v. Philadelphia, Wilmington & B. R. Co., 8 Phila. (Pa.) 345.

[24] Overmeyer v. Williams, 15 Ohio, 26; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594.

could purchase land for the purpose of having gravel dug therefrom, and transported at a certain freight over its line, to be delivered to and used by a third party;[25] but the soundness of this decision is doubtful, to say the least.*

Anticipation of future necessities.—In purchasing land or erecting buildings, a corporation is not limited to such a quantity of land, or buildings of such a size, as are necessary for its present needs, but it may anticipate future necessities by reason of expected increase or extension of its business.[26]

§ 137. Taking property to secure payment of debt.

Unless there is some express restriction in its charter or in the general law, a corporation may take real property in order to secure the payment of a debt due to it, either by a direct conveyance from its debtor, or by purchasing the same at an execution or mortgage foreclosure sale, even though it would not otherwise have the power to acquire and hold the property.[27]

§ 138. Unauthorized purposes in acquiring real property.

The implied power of a corporation to acquire and hold real property is limited by the purposes of the corporation. Even when there is no express restriction either in the charter or in the general law, a corporation has no power to purchase and hold land for a purpose which is entirely foreign to, or only remotely connected with, the objects for which it was created.[28]

[25] Old Colony R. Corp. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394.

* Camden & A. Railroad & Transp. Co. v. Mansfield, 23 N. J. Law, 510; Wilks v. Georgia Pac. R. Co., 79 Ala. 181; Eldridge v. Smith, 34 Vt. 484; Boston & New York Air Line R. Co. v. Coffin, 50 Conn. 150.

[26] People v. Pullman's Palace Car Co., 175 Ill. 125. See post, § 153, and cases there cited.

[27] Brown v. Hogg, 14 Ill. 219; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243. See post, §§ 142, 148, 194(c),(d), 202.

[28] Bostock v. North Staffordshire Ry. Co., 4 El. & Bl. 798; Case v. Kelly, 133 U. S. 21, 1 Keener's Cas. 589, 1 Smith's Cas. 495, 1 Cum. Cas. 106; Coleman v. San Rafael Turnpike Road Co., 49 Cal. 517; Occum Co. v. A. & W. Sprague Mfg. Co., 34 Conn. 529, 1 Keener's Cas. 519; Boston & New York Air Line R. Co. v. Coffin, 50 Conn. 150; Hough v. Cook County Land Co., 73 Ill. 23, 1 Cum. Cas. 90; Thweatt v. Bank of Hopkinsville, 81 Ky. 1; Inhabitants of Sutton v. Cole, 3 Pick. (Mass.) 232; Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Smith's Cas. 493, 1 Doug. (Mich.)

Illustrations.—For example, it has been held that a railroad company cannot purchase and hold surplus lands not needed for the construction or operation of its road, merely because it can thereby obtain a right of way through the land at less than it would otherwise have to pay.[29] Nor has a railroad company any implied power to purchase an interest in mining lands.[30] Neither a railroad or banking company, nor any other kind of corporation not created for the purpose of dealing in land, has any implied power to purchase or to acquire land merely for the purpose of holding and selling the same on speculation.[31]

§ 139. Enumeration of purposes.

As was stated in a previous section, if the charter of a corporation expressly declares that the corporation shall have the power to take and hold land for certain purposes, enumerating

401, 41 Am. Dec. 575; Chapman v. Colby, 47 Mich. 51; Pacific R. Co. v. Seeley, 45 Mo. 220, 100 Am. Dec. 369; New Jersey Railroad & Transp. Co. v. City of Newark, 25 N. J. Law, 315, 26 N. J. Law, 519; Clark v. Farrington, 11 Wis. 306; National Home Building & Loan Ass'n v. Home Savings Bank, 181 Ill. 35, 72 Am. St. Rep. 245; People v. Pullman's Palace Car Co., 175 Ill. 125; First M. E. Church of Chicago v. Dixon, 178 Ill. 260.

In the late Illinois case of People v. Pullman's Palace Car Co., 175 Ill. 125, it was held that a corporation authorized to manufacture railway cars, and to purchase and hold such real estate as the interests of its business may require, has no power to own and operate a farm for the production of vegetables to be sold to its employes.

It was also held in this case that such a corporation has no power to purchase real estate for the purpose of laying out a town thereon, with streets and alleys, sewerage, water, and light systems, and erecting buildings for dwellings, schools, churches, and business houses, in order to furnish homes and the conveniences and necessaries of life to its employes, since such a scheme is not necessary for the prosecution of its business.

[29] Boston & New York Air Line R. Co. v. Coffin, 50 Conn. 150.

[30] Wilks v. Georgia Pac. R. Co., 79 Ala. 180.

[31] Case v. Kelly, 133 U. S. 21, 1 Smith's Cas. 495, 1 Keener's Cas. 589, 1 Cum. Cas. 106; Pacific R. Co. v. Seeley, 45 Mo. 212, 100 Am. Dec. 369; Waldo v. Chicago, St. Paul & Fond du Lac R. Co., 14 Wis. 575; Thweatt v. Bank of Hopkinsville, 81 Ky. 1; Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Smith's Cas. 493, 1 Doug. (Mich.) 401, 41 Am. Dec. 575.

A building and loan association having power under its charter to raise funds to be loaned to its members, and to purchase real estate upon which it holds an incumbrance, and freely deal with and dispose of the same, has no power to invest its money in real estate upon which it holds no lien, and in which it has no interest. National Home Building & Loan Ass'n v. Home Savings Bank, 181 Ill. 35, 72 Am. St. Rep. 245.

them, it is to be construed as impliedly prohibiting it from acquiring and holding property for any other purpose than those specified. This doctrine was applied in a leading case in the supreme court of the United States under the charter of a railroad company which empowered it to take lands for right of way, and also such as might be needed for depot buildings, engine houses, machine shops, and other purposes connected with the use and management of the railroad. "This enumeration of the purposes for which the corporation could acquire title to real estate," said Mr. Justice Miller, "must necessarily be held exclusive of all other purposes;" and it was held that the company had no power to take donations of land from citizens interested in the construction of its road, not for right of way or other purposes enumerated in its charter, but to be held for other purposes or to be converted into money.[32]

§ 140. Power to take by devise.

(a) In general.—Under the English statute of wills, corporations could take land by devise, for bodies politic and corporate were expressly excepted. And in New York it is expressly declared by statute that no devise to a corporation shall be valid unless its charter or a statute expressly authorizes it to take by devise.[33] In Maryland, under the bill of rights, a devise

[32] Case v. Kelly, 133 U. S. 21, 1 Smith's Cas. 495, 1 Keener's Cas. 589, 1 Cum. Cas. 106.

[33] See McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; White v. Howard, 46 N. Y. 144; Starkweather v. American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133.

This statute prevents a devise of the rents and profits of land for the benefit of a corporation not expressly authorized to take by devise. Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290.

When there is a devise to a corporation not so authorized to take by devise, a court of equity cannot convert the land into personalty or money, and direct its payment to the corporation. Starkweather v. American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133.

A corporation has authority to take by devise under this statute, where its charter authorizes it to acquire land "by direct purchase or otherwise," Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; or where it is authorized generally to "acquire" real estate, without limitation as to the mode of acquiring it, Saint Clara Female Academy v. Sullivan, 116 Ill. 375, 56 Am. Rep. 776.

It seems, however, that there is no such power where a corporation is merely authorized to purchase.

to a religious corporation, to be valid, must have special sanction from the legislature.[34]

In most states, however, the statute of wills is general, and it is held that there is nothing to prevent a corporation from taking by devise.[35] A grant of power to take "by purchase" gives power to take by devise, "for the word 'purchase' includes all means of acquiring property not coming to one by descent or the mere act or operation of the law."[36]

(b) Conflict of laws.—When a corporation claims property under a devise in another state than that by or under whose laws it was created, it brings its charter with it, and its capacity to take is governed thereby, but it does not bring with it the statute of wills of the state of its creation. Therefore, if its charter allows it generally to take real estate for purposes not foreign to the objects of its creation, and the law of the state in which the property is devised to it allows foreign corporations to take by devise, the devise is valid, and is not affected by the fact that it cannot take by devise in the state of its creation under the statute of wills of that state. It was so held where a New York corporation, which could not take by devise in New York, claimed under a devise of land in Connecticut.[37]

McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516. But see American Bible Soc. v. Marshall, 15 Ohio St. 537.

That a state or the United States is not a person, within the statute of wills of New York, authorizing devises to any person capable by law of holding real estate, see In re Fox's Will, 52 N. Y. 530, 11 Am. Rep. 751; United States v. Fox, 94 U. S. 315.

[34] The sanction of the legislature must be expressly given to each specific devise to render it valid, but it may be given after the testator's death, if the corporation was in existence at the time of his death. Church Extension of M. E. Church v. Smith, 56 Md. 392.

Power to take by devise is not included in the power to take and hold "subscriptions or contributions." Brown v. Thompkins, 49 Md. 423.

[35] White v. Howard, 38 Conn. 342, 1 Smith's Cas. 185, 1 Keener's Cas. 556, 1 Cum. Cas. 81; American Bible Soc. v. Marshall, 15 Ohio St. 537; Thompson v. Swoope, 24 Pa. St. 474; McIntosh v. City of Charleston, 45 S. C. 584; Rivanna Nav. Co. v. Dawsons, 3 Grat. (Va.) 19, 46 Am. Dec. 183.

That the United States may take by devise as a body politic or corporate, see Dickson v. United States, 125 Mass. 311, 28 Am. Rep. 230.

[36] Peckham, J., in Re McGraw's Estate, 111 N. Y. 66, 1 Smith's Cas. 483, 1 Keener's Cas. 571, 2 Cum. Cas. 22.

[37] White v. Howard, 38 Conn. 342, 1 Smith's Cas. 185, 1 Keener's Cas. 556, 1 Cum. Cas. 81. Com-

On the other hand, the fact that the charter of a corporation authorizes it to take land by devise does not render valid a devise to it in a state in which a statute prohibits foreign corporations from taking by devise.[38]

§ 141. Power to take a lease.

A corporation has the implied power, in the absence of express restrictions, to take a lease of real property, whenever it is a necessary or proper means of carrying out the purposes for which it was created.[39] Thus, it has been held that a turnpike company may take a lease of premises for the purpose of storing the implements used in repairing its road, and of sheltering its employes.[40] A corporation, however, cannot take a lease of property for a purpose which is foreign to the legitimate objects of its creation.[41]

§ 142. Express or implied prohibition.

(a) In general.—As already explained, corporations are impliedly prohibited from taking and holding real property for

pare, however, Starkweather v. American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; House of Mercy of New York v. Davidson, 90 Tex. 529.

[38] White v. Howard, 46 N. Y. 144.

[39] Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Crawford v. Longstreet, 43 N. J. Law, 325, 1 Keener's Cas. 545; Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514; Welsh v. Ferd Heim Brewing Co., 47 Mo. App. 608; Brewer & Hofmann Brewing Co. v. Boddie, 181 Ill. 622, affirming 80 Ill. App. 353. See ante, § 128(d)(2).

[40] Crawford v. Longstreet, 43 N. J. Law, 325, 1 Keener's Cas. 545.

[41] Occum Co. v. A. & W. Sprague Mfg. Co., 34 Conn. 529, 1 Keener's Cas. 519; Camden & Atlantic R. Co. v. May's Landing & E. H. City R. Co., 48 N. J. Law, 530.

"A corporation chartered for a specific purpose has no power to take a lease of property not needed for that purpose, and of no substantial use to it, with the intention and for the purpose of harassing another party by the use, under the forms of law, of the supposed rights thus obtained." Occum Co. v. A. & W. Sprague Mfg. Co., 34 Conn. 529.

Where a corporation is authorized "to carry on a general brewing and malting business and manufacture and sell soda waters," it is not, as a matter of law, ultra vires for it to take a lease of premises "to be occupied for a saloon and no other purpose whatever," for the word "saloon" does not necessarily mean a place for the sale of intoxicating liquors, and not a place for the sale of soda water. Brewer & Hofmann Brewing Co. v. Boddie, 181 Ill. 622, affirming 80 Ill. App. 353.

purposes foreign to the object for which they were created.[42] There are also other prohibitions, express or implied.

The capacity to take and hold land which was vested in corporations by the common law was considered contrary to the policy of English institutions, and was restricted by the statutes known as the statutes of mortmain, which prohibited corporations, whether ecclesiastical or lay, from taking and holding lands without license from the king or from parliament.[43]

Except in Pennsylvania,[44] the English statutes of mortmain have not been regarded as in force in the United States,[45] but in most states, perhaps, there are constitutional or statutory provisions expressly restricting the power of corporations to take and hold land. Thus, in Maryland, under the bill of rights, there must be special legislative sanction to enable a religious corporation to take land either by sale, gift, or devise.[46]

A general statutory or constitutional prohibition against conveyances or devises to corporations is not to be construed as retroactive, so as to affect conveyances or devises which have already taken effect.[47]

When a corporation is prohibited from taking or holding

[42] Ante, § 138.

[43] 1 Bl. Com. 478; 2 Kent's Com. 282.

[44] Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 1 Keener's Cas. 551, 1 Cum. Cas. 85, 1 Smith's Cas. 453; Pittsburgh Methodist Church v. Remington, 1 Watts (Pa.) 218.

[45] White v. Howard, 38 Conn. 342, 1 Smith's Cas. 185, 1 Keener's Cas. 556, 1 Cum. Cas. 81; Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378, 1 Cum. Cas. 76; Rivanna Nav. Co. v. Dawsons, 3 Grat. (Va.) 19, 46 Am. Dec. 183; Lathrop v. Commercial Bank of Scioto, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Moore v. Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594.

[46] Trustees of Catholic Cathedral Church of Baltimore v. Manning, 72 Md. 116.

That the legislature may ratify a conveyance of land to a religious corporation, see Trustees of Catholic Cathedral Church of Baltimore v. Manning, 72 Md. 116.

As to devises, see ante, § 140.

In some states a corporation is prohibited from acquiring or holding real estate unless a certain number or proportion of its stockholders are citizens of the United States. Where a corporation is organized under the laws of the state, it will be presumed, in the absence of evidence to the contrary, that a sufficient percentage of its stockholders are citizens, so as to entitle it to acquire and hold real estate. Northwestern Telephone Exchange Co. v. Chicago, Milwaukee & St. P. Ry. Co., 76 Minn. 334.

[47] Kelso v. Stigar, 75 Md. 376.

land, it cannot purchase and take indirectly through an agent.[48] Nor can it take and hold land as trustee.[49]

A railroad company is not prohibited from taking a note and mortgage on land as security for a debt by a provision of its charter that it shall not hold, purchase, or deal in any lands other than such as are necessary for use in the running of its road. Such a provision is intended to prohibit the company from purchasing, holding, or dealing in real estate directly, and in a manner unconnected with the lawful and proper management and control of its business, and not to prevent it from acquiring an interest in land incidentally whenever, in the proper exercise of its powers, it becomes necessary for it to do so in order to protect its legal rights.*

(b) Trust for benefit of corporation, and equitable conversion.—It has been said that such a prohibition prevents a corporation from taking the beneficial interest in land by having another take the legal title in trust for its benefit;[50] but it has been held that it does not prevent a conveyance of land to a trustee to sell the same and apply the proceeds in satisfaction of a debt due to a corporation, or otherwise for its benefit.[51]

Generally, when land is conveyed or devised to a trustee, to sell the same and pay the money to a corporation, there is, under the doctrine of equitable conversion, a gift, not of the land, but of the money; and the transaction, therefore, is not within a prohibition against the corporation's taking or holding real estate under a devise or otherwise.[52]

[48] Cox v. Gould, 4 Blatchf. 341, Fed. Cas. No. 3,301. But see Fisk v. Patton, 7 Utah, 399.

[49] United States Trust Co. of New York v. Lee, 73 Ill. 142.

* Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709. See post, § 187(a).

[50] Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Coleman v. San Rafael Turnpike Road Co., 49 Cal. 417; Theological Seminary of Auburn v. Childs, 4 Paige (N. Y.) 419. Compare, however, McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

[51] Zantzingers v. Gunton, 19 Wall. (U. S.) 32; Germain v. Baltes, 113 Ill. 29. And see Fisk v. Patton, 7 Utah, 399; Wright v. Trustees of M. E. Church of New York City, Hoff. Ch. (N. Y.) 202. But compare the cases cited in the note preceding.

[52] Given v. Hilton, 95 U. S. 591; State v. Wiltbank's Adm'r, 2 Har. (Del.) 22; Germain v. Baltes, 113 Ill. 29; Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Wright v. Trustees of M. E. Church of New York City, Hoff. Ch. (N. Y.) 202; Draper v. President, etc., of Har-

(c) Prohibition against holding as a prohibition against taking.—In a leading case in Pennsylvania it was held that a statute or charter forbidding a corporation to "purchase *and* hold" real property was a prohibition against holding merely, and did not render void a conveyance of land to a corporation, but that the corporation acquired a title under the conveyance which it could convey to another, subject only to the right of the state to institute proceedings to defeat the title.[53]

The better opinion, however, is that a prohibition against holding land is a prohibition against taking the same.[54] As was said in a Michigan case: "The disability to hold lands seems almost necessarily to imply a disability to become the grantee and vendor of real estate. There can be no grant of land without a grantee capable of taking; and he who takes and conveys to another must necessarily be, for the time intervening, the holder of the estate. If the restriction in the charter takes away the capacity to hold, it must, therefore, take away the power of receiving the estate for the purpose of conveying to another. The corporation cannot deal in real estate, receiving and conveying the title in its corporate capacity, without in every instance holding that estate; and a title derived through it, to be good, must necessarily imply the right of the corporation to take the estate and hold the title until conveyed.[55]

vard College, 57 How. Pr. (N. Y.) 269; Theological Seminary of Auburn v. Childs, 4 Paige (N. Y.) 419; Dodge v. Williams, 46 Wis. 70; Milwaukee Protestant Home for Aged v. Becher, 87 Wis. 409; Orrick v. Boehm, 49 Md. 72; Church Extension of M. E. Church v. Smith, 56 Md. 362; American Bible Soc. v. Noble, 11 Rich. Eq. (S. C.) 156. But see King v. Rundle, 15 Barb. (N. Y.) 150.

If a statute prohibits and declares void devises to religious corporations, the object being to restrict the testamentary power of owners of property, and not to prevent such corporations from acquiring property, a devise of land in trust to sell the same, and pay the proceeds to such a corporation, is void. State v. Wiltbank's Adm'r, 2 Har. (Del.) 18.

[53] Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 1 Smith's Cas. 453, 1 Keener's Cas. 551, 1 Cum. Cas. 85.

[54] Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Smith's Cas. 493, 1 Doug. (Mich.) 401, 41 Am. Dec. 575; In re McGraw's Estate, 111 N. Y. 66, 1 Smith's Cas. 483, 1 Keener's Cas. 571; Rivanna Nav. Co. v. Dawsons, 3 Grat. (Va.) 22, 46 Am. Dec. 183.

[55] Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Smith's Cas. 493, 1 Doug. (Mich.) 401, 41 Am. Dec. 575.

(d) Restriction as to quantity or value.—In the absence of express restrictions there is no limitation upon the quantity or value of the property which a corporation may hold, other than such as results from the rule that it cannot hold property for a purpose which is foreign to the objects for which it was created.[56] In some jurisdictions, however, there are express constitutional or statutory provisions that a corporation, or a particular kind of corporation, shall not take or hold land in excess of a certain quantity or value, and, of course, a corporation has no right to exceed the limit so fixed.[57] Nor has a corporation the power to exceed such a limit fixed by its charter.[58]

Generally, such a limitation in a statute applies in terms to corporations of a particular kind only, and does not affect other corporations. Thus, prohibition against the holding of land by a corporation organized for the purpose of "religious worship" does not affect the capacity of an incorporated Young Men's Christian Association,[59] or of a corporation for missionary purposes only.[60]

(e) Purchase of property to procure monopoly.—A corporation has no power to purchase the property of other persons or cor-

[56] Market St. Ry. Co. v. Hellman, 109 Cal. 590; Spear v. Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; Andrews v. Andrews, 110 Ill. 223; ante, § 136.

[57] In re McGraw's Estate, 111 N. Y. 66, 1 Smith's Cas. 483, 1 Keener's Cas. 571; Chamberlain v. Chamberlain, 43 N. Y. 424; Cromie v. Louisville Orphans' Home Soc., 3 Bush (Ky.) 365; Wood v. Hammond, 16 R. I. 98.

Where the statute merely limits the quantity of land which a corporation may hold, there is no limitation as to value. Andrews v. Andrews, 110 Ill. 223.

Nor does a limitation as to the amount or value of personal property constitute any restriction upon the holding of real property. Such a limitation, therefore, does not affect a devise of real estate in trust to sell the same, and with the proceeds erect a building for a corporation. Cruse v. Axtell, 50 Ind. 49.

In determining the value of property owned by a corporation, it has been held that the corporation's indebtedness for the property must be deducted. Wetmore v. Parker, 52 N. Y. 450.

Increase in the value of property, and consequent increase in the income of a corporation from its vested estates, does not divest its title. Bogardus v. Rector, etc., of Trinity Church, 4 Sandf. Ch. (N. Y.) 758.

[58] Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Smith's Cas. 493, 1 Doug. (Mich.) 401, 41 Am. Dec. 575.

[59] Hamsher v. Hamsher, 132 Ill. 273.

[60] Gilmer v. Stone, 120 U. S. 586.

porations engaged in the same business, for the purpose of obtaining control of such business and creating a monopoly. Such a transaction is not only *ultra vires,* but it is also contrary to public policy and illegal.[61]

(f) Exception of particular purposes.—Charters or statutes prohibiting corporations from taking and holding real property, like the national banking act, for example, generally contain exceptions, and allow them to hold such real estate as may be necessary for their immediate accommodation in the transaction of their business;[62] or to take a mortgage on land as security for debts,[63] or debts previously contracted;[64] or to take a conveyance of land in payment or satisfaction of debts previously contracted;[65] or to purchase at sales under judgments, decrees, or mortgages in their favor,[66] or at a sale under a mortgage given for a debt previously contracted.[67] Real estate thus acquired is generally required by the statute to be disposed of by the corporation at public or private sale within a certain time, the object being to permit the corporation to secure payment of their claims, and not to acquire and hold the land longer than is reasonably necessary for this purpose.[68]

[61] Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200.

[62] See Bank of Virginia v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

[63] See Sparks v. State Bank, 7 Blackf. (Ind.) 469; Thomaston Bank v. Stimpson, 21 Me. 195.

[64] Warner v. De Witt County Nat. Bank, 4 Ill. App. 305.

[65] Baird v. Bank of Washington, 11 Serg. & R. (Pa.) 411; Turner v. First Nat. Bank of Madison, 78 Ind. 19; Mapes v. Scott, 94 Ill. 379; Columbus Buggy Co. v. Graves, 108 Ill. 459; Thomaston Bank v. Stimpson, 21 Me. 195.

Such an exception does not permit a corporation to take a conveyance of land in consideration of a transfer by it to the grantor of drafts to which the grantor is not a party. State Bank v. Coquillard, 6 Ind. 232.

[66] As to the construction of such a provision, see Martin v. Branch Bank at Decatur, 15 Ala. 587, 50 Am. Dec. 147; Russell v. Topping, 5 McLean, 194, Fed. Cas. No. 12,163; Chautauqua County Bank v. Risley, 4 Denio (N. Y.) 480; Brown v. Hogg, 14 Ill. 219; Holmes v. Boyd, 90 Ind. 332.

[67] See John A. Roebling Sons' Co. v. First Nat. Bank of Richmond, 30 Fed. 744; Heath v. Second Nat. Bank of Lafayette, 70 Ind. 106; Wherry v. Hale, 77 Mo. 20; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405.

[68] As to compliance with this provision and the effect of failure to comply, see London & Canadian Loan & Agency Co. v. Graham, 16 Ont. 329; Home Ins. Co. v. Head, 30 Hun (N. Y.) 405.

§ 143. Presumption.

When a corporation, authorized to hold real property under some circumstances or for some purposes, purchases and takes a conveyance of property, it will be presumed that it did so for an authorized purpose until the contrary is affirmatively shown, for, as we have seen, the presumption is that a corporation has not exceeded its powers.[69]

II. Power to Take and Hold Personal Property and Choses in Action.

§ 144. In general.—A corporation has the implied power to take personal property, including choses in action, by purchase, gift, or bequest, or as bailee, provided it is not taken for a purpose which is foreign to the objects for which it was created, and provided it violates no express constitutional or statutory restriction.

That a corporation has the capacity and power to take and hold personal property for purposes not foreign to the legitimate objects of its creation admits of no doubt.[70] This includes the power to take and enforce choses in action.[71] And it includes the power to take by gift or bequest, as well as by purchase.[72] For reasons given in a previous section, it cannot take as joint tenant, but it may take as tenant in common.[73]

[69] Kentucky Lumber Co. v. Green, 87 Ky. 257; Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Yates v. Van de Bogert, 56 N. Y. 526; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 595; Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 158; People v. La Rue, 67 Cal. 526; Stockton Sav. Bank v. Staples, 98 Cal. 189, 1 Smith's Cas. 179. See ante, § 128 (c)(3).

[70] 1 Kyd, Corp. 104; Blanchard's Gun-Stock Turning Factory v. Warner, 1 Blatchf. 277, Fed. Cas. No. 1,521; Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315, 1 Keener's Cas. 477; and cases hereafter cited.

[71] Post, § 147.

[72] Perin v. Carey, 24 How. (U. S.) 465; Trustees of Phillips Academy v. King, 12 Mass. 546; Wade v. American Colonization Soc., 7 Smedes & M. (Miss.) 663, 45 Am. Dec. 324; Chamberlain v. Chamberlain, 43 N. Y. 424; Trustees of Theological Seminary of Auburn v. Kellogg, 16 N. Y. 83; Rivanna Nav. Co. v. Dawsons, 3 Grat. (Va.) 19, 46 Am. Dec. 183; Protestant Episcopal Educational Soc. v. Churchman, 80 Va. 718; Lewisburg Baptist University v. Tucker, 31 W. Va. 621. The United States may take a bequest as a body corporate. Dickson v. United States, 125 Mass. 311, 28 Am. Rep. 230.

[73] Ante, § 134; Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637; New York & Sharon Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412.

§ 145. Purposes for which property may be required.

The general rule is that a corporation, in the absence of express prohibition, may purchase personal property of any kind whenever it is reasonably necessary or convenient to enable it to carry on its business and accomplish the objects of its creation;[74] but it cannot purchase property, or take by gift or bequest, for a purpose which is foreign to the objects of its creation.[75]

Authorized purposes.—For example, a mining company may buy timber, when it is necessary for use in its business,[76] and a coal mining company may purchase a steamboat for the purpose of transporting and delivering its coal.[77] A manufacturing and trading company, authorized to manufacture and sell glass, may buy glass from another manufactory for the purpose of keeping up its stock and supplying its customers while its works are being repaired.[78] It has also been held that a manufacturing company may buy more raw material than it needs at the time, in order to take advantage of a low market.[79] And it has been held that a corporation for maintaining an asylum for aged people may take all the property of an applicant for admission in consideration of admitting and caring for him.[80]

[74] Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315, 1 Keener's Cas. 477; Blanchard's Gun-Stock Turning Factory v. Warner, 1 Blatchf. 277, Fed. Cas. No. 1,521; Callaway Min. & Mfg. Co. v. Clark, 32 Mo. 305; Adams Min. Co. v. Senter, 26 Mich. 73; Bennington Iron Co. v. Rutherford, 18 N. J. Law, 467; Rivanna Nav. Co. v. Dawsons, 3 Grat. (Va.) 19, 46 Am. Dec. 183; Wheeler v. San Francisco & Alameda R. Co., 31 Cal. 46, 89 Am. Dec. 147; Rosenbaum v. Horton, 89 Iowa, 692.

[75] Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Keener's Cas. 514, 1 Cum. Cas. 343; Downing v. Mount Washington Road Co., 40 N. H. 230, 1 Smith's Cas. 148, 1 Cum. Cas. 148; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Keener's Cas. 762, 1 Cum. Cas. 261; Chewacla Lime Works v. Dismukes, 87 Ala. 344, 1 Keener's Cas. 469; Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198, 23 Am. Rep. 683; Morgan v. Donovan, 58 Ala. 241; Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 19 Am. St. Rep. 482, 1 Keener's Cas. 819, 1 Smith's Cas. 500.

[76] Adams Min. Co. v. Senter, 26 Mich. 73.

[77] Callaway Min. & Mfg. Co. v. Clark, 32 Mo. 305.

[78] Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315, 1 Keener's Cas. 477.

[79] National Shoe & Leather Bank's Appeal, 55 Conn. 469.

[80] General German Aged People's Home of Baltimore v. Hammer-

A corporation created for manufacturing purposes has the power to purchase and hold a patent for an invention whenever it is necessary or proper in the conduct of its business.[81]

Taking in payment of debt or as security, etc.—In the absence of express restrictions, a corporation has the power to take personal property as collateral security for a debt, whether contracted previously or at the time.[82] And it may take such property in payment of a debt due to it, in order to prevent loss,[83] or, for a like purpose, it may buy property at a sale under a judgment, mortgage, or pledge in its favor.[84]

Unauthorized purposes.—On the other hand, a corporation has no power to purchase personal property for use in a business or transaction not authorized by its charter. Thus, a railroad company cannot purchase steamboats for the purpose of running a steamboat line beyond the terminus of its road.[85] A turnpike company cannot purchase horses and wagons for the purpose of transporting persons over its road.[86] And a manufacturing company, while it may purchase raw material necessary for its business of manufacturing, cannot purchase on speculation and merely for the purpose of selling again.[87] The same is true of railroad companies, steamboat companies, and other corporations not organized for the purpose of dealing generally in

backer, 64 Md. 595, 54 Am. Rep. 782.

A college or other educational corporation may take a gift or bequest of personal property for the purpose of endowing a professorship. Trustees of Theological Seminary of Auburn v. Kellogg, 16 N. Y. 83.

[81] Blanchard's Gun-Stock Turning Factory v. Warner, 1 Blatchf. 258, Fed. Cas. No. 1,521; In re British & Foreign Cork Co., L. R. 1 Eq. 231.

[82] Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117; Commercial Bank of Manchester v. Nolan, 7 How. (Miss.) 508.

[83] Rosenbaum v. Horton, 89 Iowa, 692; First Nat. Bank of Ottumwa v. Reno, 73 Iowa, 145; De Groff v. American Linen Thread Co., 21 N. Y. 124; Panhandle Nat. Bank v. Emery, 78 Tex. 498.

[84] Farmers' & Millers' Bank of Milwaukee v. Detroit & Milwaukee R. Co., 17 Wis. 372.

[85] Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353, 1 Smith's Cas. 435; Parish v. Wheeler, 22 N. Y. 494.

[86] Downing v. Mount Washington Road Co., 40 N. H. 230, 1 Smith's Cas. 148, 1 Cum. Cas. 148.

[87] Chewacla Lime Works v. Dismukes, 89 Ala. 344, 1 Keener's Cas. 469; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Keener's Cas. 762, 1 Cum. Cas. 261.

goods.[88] A manufacturing company may purchase material needed by it through a broker and for future delivery;[89] but neither a manufacturing company, nor a bank, nor any other corporation not expressly authorized, can speculate by dealing in futures on the stock or produce exchange, through an agent or otherwise.[90] A coal mining company cannot, unless expressly authorized, purchase coal on speculation for the purpose of selling it again, although it may undoubtedly, in case of a strike or other emergency, buy coal for the purpose of fulfilling its contracts.[91] A railroad company cannot purchase the property of a rival carrier for the purpose of withdrawing it from the business and removing competition.[92]

§ 146. Power to take as bailee.

A corporation has the power to take property as bailee whenever such a transaction is reasonably necessary or incidental to the business for which it was created, but it has no power to become a bailee if the transaction is foreign to the objects of its creation. For example, a savings bank, unless expressly authorized, cannot take bonds or other property for safe-keeping.[93] On the other hand, however, it has been held that an incorporated library board, authorized to hold personal property by gift, purchase, or otherwise, and to provide "for the government and regulation of libraries and other collections," has the power to become bailee of any property—as a collection

[88] Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Smith's Cas. 590, 1 Cum. Cas. 245.

In Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Keener's Cas. 504, 1 Cum. Cas. 343, it was held that a savings bank cannot purchase property of any kind on credit, where it is not needed for immediate use, or for investment of existing funds.

[89] It is not ultra vires for a cotton-mill corporation to purchase cotton for future delivery, through a broker, and put up margins to carry the contract, where the transaction is not for the purpose of speculation, but in the ordinary business of the corporation, and for its own use. Sampson v. Camperdown Cotton Mills, 82 Fed. 833.

[90] Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 19 Am. St. Rep. 482, 1 Smith's Cas. 500, 1 Keener's Cas. 819.

[91] Alexander v. Cauldwell, 83 N. Y. 480.

[92] Morgan v. Donovan, 58 Ala. 241.

[93] Greeley v. Nashua Sav. Bank, 63 N. H. 145.

of coins, for example—which is proper for exhibition in a public museum.[94] Corporations for the purpose of the business of carriers of goods, warehousemen, innkeepers, and pawnbrokers are clearly authorized to become bailees within the scope of their business, but they cannot, any more than any other corporation, become bailees for unauthorized purposes.

§ 147. Power to take and hold choses in action.

Authorized purposes.—A corporation has the power, by purchase or otherwise, to take and hold choses in action, such as promissory notes, bills of exchange, bonds, etc., and to enforce the same, whenever it is necessary or proper in the conduct of its legitimate business, provided there are no restrictions in its charter or the general law.[95]

A corporation authorized to acquire and hold "personal property" or "commercial paper" may purchase and hold promissory notes,[96] city warrants,[97] negotiable bonds,[98] and the like. A corporation may take an assignment of an account, or of rights under any other contract, in order to secure payment of a debt due to it, or to otherwise save itself from loss;[99] or it

[94] Smith v. Library Board of Minneapolis, 58 Minn. 108.

[95] Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338; McIntire v. Preston, 10 Ill. 48, 48 Am. Dec. 321; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Bennington Iron Co. v. Rutherford, 18 N. J. Law, 467; Wayland University v. Boorman, 56 Wis. 657; Bank of Ashland v. Jones, 16 Ohio St. 145; Salmon Falls Bank v. Leyser, 116 Mo. 51; Hart v. Missouri State Mutual Fire & Marine Ins. Co., 21 Mo. 91; Gee v. Alabama Life Ins. & Trust Co., 13 Ala. 579.

In a late Ohio case it was held that a corporation formed for the purpose of manufacturing and dealing in a particular line of goods may, instead of incurring the delay and expense incident to the construction of a new manufacturing plant, and building up of an independent business, purchase of an existing partnership, engaged in a like business, its established plant and assets, including its outstanding claims, among which is one for damages to the property caused by another's negligence; and if it does so, it acquires a valid title to the claim for damages, and may maintain an action thereon. Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co., 60 Ohio St. 96.

[96] Wayland University v. Boorman, 56 Wis. 657.

[97] Aull Sav. Bank v. City of Lexington, 74 Mo. 104.

[98] Mount Vernon Bank v. Porter, 52 Mo. App. 244.

[99] Mahoney v. Butte Hardware Co., 19 Mont. 377; Bank of North America v. Tamblyn, 7 Mo. App. 571; Lagow v. Badollet, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258.

Thus, a corporation organized

may purchase for such purpose, and enforce, a judgment in favor of another.[100]

Unauthorized purposes.—A corporation, however, has no power to purchase or deal in choses in action if there is an express prohibition in its charter or in the general law, or if the particular transaction is not within the objects for which it was created.[101] Thus, mining companies, manufacturing companies, and the like, cannot deal in or purchase notes, bonds, or other choses in action, otherwise than by taking the same in the course of their business or for debts.[102] And by the weight of authority a banking corporation, authorized by its charter merely to discount and negotiate bills and notes, cannot deal in them by buying and selling.[103]

In an Ohio case it was held that an insurance corporation, though empowered by its charter to invest its funds and capital stock as should be deemed best by the directors for the safety of the capital and interest of the stockholders, had no power to purchase upon credit the promissory note of one of its insured, who was entitled to indemnity for a loss, for the purpose of set-

for the purpose of dealing in hardware may purchase an account secured by lien against a mining company, if the purchase is made in good faith, to protect its own interests as a creditor of the mining company. Mahoney v. Butte Hardware Co., 19 Mont. 377.

[100] Brown v. Hogg, 14 Ill. 219.

Where practically all the assets of a corporation have been transferred to it by its stockholders in fraud of their judgment creditors, it is not ultra vires for it to purchase the judgments, and secure the release of the assets from attachment. Sutton v. Dudley, 153 Pa. St. 194.

[101] Straus v. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 59; White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co., 12 Ohio St. 601; Salmon River Mining & Smelting Co. v. Dunn, 2 Idaho, 30; Bank of Edwardsville v. Simpson, 1 Mo. 184; Simpson Centenary College v. Bryan, 50 Iowa, 293; Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

[102] Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Salmon River Mining & Smelting Co. v. Dunn, 2 Idaho, 30.

[103] First Nat. Bank of Rochester v. Harris, 108 Mass. 514; Atlantic State Bank of Brooklyn v. Savery, 82 N. Y. 291; Lazear v. National Union Bank of Maryland, 52 Md. 78, 36 Am. Rep. 355; Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198, 23 Am. Rep. 683; First Nat. Bank of Rochester v. Pierson, 24 Minn. 140; Nicholson v. National Bank of Newcastle, 92 Ky. 251. But see Niagara County Bank v. Baker, 15 Ohio St. 68; Smith v. Exchange Bank of Pittsburg, 26 Ohio St. 141.

ting off the note against the claim.[104] And in a late Wisconsin case it was held that it was *ultra vires* for a trading corporation, engaged in buying and selling goods, and which certain persons had conspired to defraud and had defrauded, to purchase and take an assignment of claims for damages of other persons who were defrauded in pursuance of the same conspiracy.[105]

§ 148. Constitutional or statutory restrictions.

In some jurisdictions the power of corporations, or of particular kinds of corporations, with respect to taking and holding personal property, like their power with respect to real property, is expressly restricted by the constitution or by statute, and sometimes express prohibition or limitation is contained in the charter. Thus, it is sometimes declared that a corporation shall not take or hold more than a certain amount of property.[106] In determining whether a corporation has more property than it is permitted to hold, any indebtedness for its property must be deducted.[107]

Sometimes banks, railroad companies, and the like, are expressly prohibited from dealing in goods. Such a prohibition, it seems, contemplates dealing in goods as a business, and does not apply to a single isolated transaction.[108] It is not to be so construed as to prevent a corporation from taking property in good faith in payment of or as security for a debt previously contracted, in order to secure payment of the debt and prevent loss.[109] Nor does a prohibition against dealing in goods apply

[104] Straus v. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 59.

[105] John V. Farwell Co. v. Wolf, 96 Wis. 10. It was held, however, that the defense of ultra vires could not be set up to defeat its action on such claims. See post, § 229(b).

[106] See Wetmore v. Parker, 52 N. Y. 450; In re McGraw's Estate, 111 N. Y. 66, 1 Keener's Cas. 571, 1 Smith's Cas. 483, 2 Cum. Cas. 22.

[107] Wetmore v. Parker, 52 N. Y. 450.

[108] Graham v. Hendricks, 22 La. Ann. 523; Sackett's Harbor Bank v. Lewis County Bank, 11 Barb. (N. Y.) 213.

A statute declaring that no corporation shall engage in "stock-jobbing" not only prohibits a corporation from dealing in shares of stock of corporations, but also prohibits it from dealing in bonds and debentures. State v. Debenture Guarantee & Loan Co., 51 La. Ann. 1874.

[109] Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117.

to the taking of goods as collateral security for the payment of a debt contracted at the time.[110]

III. Power to Take and Hold Property in Trust.

§ 149. In general.—In the absence of express restriction, a corporation has the same capacity as a natural person to hold real or personal property in trust, provided its acting as trustee is not foreign to its objects. If property is conveyed, devised, or bequeathed in trust to a corporation which is without power to execute the trust, a court of equity will appoint a competent trustee to execute the same.

§ 150. Corporations may act as trustee.

For several technical reasons it was formerly thought that corporations aggregate could not hold either real or personal property in trust for another. One of the reasons given was that, since a corporation aggregate had no soul or conscience, no trust or confidence could be reposed in it, and a court of equity, which acted upon the conscience of a trustee in compelling the execution of a trust, could not compel it to execute the trust. Other reasons were that a corporation, being impersonal, could not be imprisoned for contempt in refusing to obey the decrees of the court, and could not take the oath required of trustees.[111]

This view, however, has long since been abandoned, and it is now settled beyond any question that corporations aggregate have the same capacity and power as a natural person to act as trustee, and to hold property in trust, provided the purpose is not foreign to the objects of its creation, and provided there are no charter or statutory prohibitions.[112] "Although it was

[110] Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117.

[111] 1 Bl. Com. 477; Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7.

[112] Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127; Jones v. Habersham, 107 U. S. 174, 189; Southington First Congregational Soc. v. Atwater, 23 Conn. 34; Crandall v. Lincoln, 52 Conn. 97, 52 Am. Rep. 560; Fidelity Insurance, Trust & Safe Deposit Co. v. Niven (Deringer's Adm'r v. Deringer's Adm'r) 5 Houst. (Del.) 416, 1 Am. St. Rep. 150; White v. Rice, 112 Mich. 403; Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7; Sinking Fund Commissioners v. Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433; Wetmore v. Parker, 52 N. Y. 450;

in early times held," said Mr. Justice Story, "that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, namely, the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where a corporation has a legal capacity to take real and personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do."[113]

Thus, eleemosynary or charitable corporations, like incorporated hospitals, colleges, and the like, and religious corporations, can hold property on the trusts which are within the objects of their creation.[114] And in many states statutes have been enacted, creating or authorizing corporations for the express purpose of acting as executor, administrator, guardian, committee, etc., and have been sustained.[115] Even a manufac-

Farmers' Loan & Trust Co. v. Harmony Fire & Marine Ins. Co., 51 Barb. (N. Y.) 33, 41 N. Y. 619; Morris v. Way, 16 Ohio, 469; Lincoln Sav. Bank v. Ewing, 12 Lea (Tenn.) 598; Protestant Episcopal Education Soc. v. Churchman, 80 Va. 718; Killingsworth v. Portland Trust Co., 18 Or. 351, 17 Am. St. Rep. 737; Union Bank & Trust Co. v. Wright (Tenn. Ch. App.) 58 S. W. 755.

[113] Vidal v. Girard's Ex'rs, 2 How. (U. S.) 187.

There is nothing in the nature of a corporation to prevent it from acting as agent or attorney in fact for another, and it may execute a conveyance as attorney in fact for another, where its charter authorizes it "to act as the general or special agent, or attorney in fact, for any public or private corporation or person in the management and control of real estate or other property, its purchase, sale, or conveyance, etc." Killingsworth v. Portland Trust Co., 18 Or. 351, 17 Am. St. Rep. 737. See post, § 189.

[114] Attorney General v. Ironmongers' Co., 2 Beav. 313; Southington First Congregational Soc. v. Atwood, 23 Conn. 34; Trustees of Phillips Academy v. King, 12 Mass. 546; Wade v. American Colonization Soc., 7 Smedes & M. (Miss.) 663, 45 Am. Dec. 324; Mason's Ex'rs v. Trustees of Tuckerton M. E. Church, 27 N. J. Eq. 47; Wetmore v. Parker, 52 N. Y. 450; Liggett v. Ladd, 23 Ore. 26; Heiskell v. Chickasaw Lodge, 87 Tenn. 668; Protestant Episcopal Education Soc. v. Churchman, 80 Va. 78.

[115] Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7. See, also, Crandall v. Lincoln, 52 Conn. 97, 52 Am. Rep. 560; Johnson v. Johnson, 88 Ky. 275; Glaser v. Priest, 29 Mo. App. 1; In re Rice, 42 Mich. 528; Fidelity Insurance, Trust & Safe Deposit Co. v. Niven (Deringer's Adm'r v. Deringer's Adm'r) 5 Houst. (Del.) 416, 1 Am. St. Rep. 157; Union Bank & Trust Co. v. Wright (Tenn. Ch. App.) 58 S. W. 755.

"The reason why a corporation was unable to perform the office of executor or administrator, as stated by Blackstone, was that it

turing corporation, or a bank, or insurance company, or any other modern business corporation may take property in trust to secure a debt due to it, or for any other purpose which is not foreign to its legitimate objects.[116]

Whenever property is devised or granted to a corporation, partly for its own use and partly for the use of others, its power to take and hold the property for its own use carries with it, as a necessary incident, the power to execute that portion of the trust which relates to others.[117]

§ 151. Ultra vires or prohibited conveyance or devise in trust.

Except as stated above, no corporation can lawfully take property, real or personal, in trust for a purpose which is foreign to the objects for which it was created.[118] And of course a corporation which is prohibited by its charter or by statute from taking a conveyance or devise of property, as heretofore

could not take an oath for the due execution of the office. 1 Bl. Com. 477. But, to enable a corporation to act as executor or administrator, the statute may dispense with the oath, or provide that some one of its officers may take it, or the law of the state may not require any oath for the due execution of the office, and in such case, when no other impediment intervenes, a corporation may act as administrator when the law of the state does not require the administrator to take an oath." Killingsworth v. Portland Trust Co., 18 Or. 351, 17 Am. St. Rep. 737.

[116] Farmers' Loan & Trust Co. v. Harmony Fire & Marine Ins. Co., 51 Barb. (N. Y.) 33, 41 N. Y. 619; Morris v. Way, 16 Ohio. 469; Lincoln Sav. Bank v. Ewing, 12 Lea (Tenn.) 598. And see White v. Rice, 112 Mich. 403.

And the validity of a trust deed to a corporation is not affected by its inability to comply with a statute requiring trustees to make an oath and give a bond. Lincoln Sav. Bank v. Ewing, 12 Lea (Tenn.) 598.

[117] Chancellor Walworth, in Re Howe, 1 Paige (N. Y.) 214.

[118] Thus, a corporation authorized by its charter to establish and maintain an institution "for the instruction of youth" cannot take property in trust to pay over the income thereof for the support of missionaries. Trustees of South New Market Methodist Seminary v. Peaslee, 15 N. H. 317.

See, also, Chapin v. School Dist. No. 2, 35 N. H. 445 (where it was held ultra vires for a school district to take property in trust for the support of the ministry).

And see Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; Jackson v. Hartwell, 8 Johns. (N. Y.) 330; Farmers' Loan & Trust Co. v. Carroll, 5 Barb. (N. Y.) 613.

Where a note was executed to a corporation as administrator of a decedent's estate, it was held that the maker was estopped to deny the capacity of the corporation to act as administrator, in an action on the note brought by it in its representative character. Union Bank & Trust Co. v. Wright (Tenn. Ch. App.) 58 S. W. 755.

explained, cannot take a conveyance or devise in trust for another.[119] If property is conveyed, devised, or bequeathed to a corporation in trust, when it has no power under its charter to hold the same or to execute the trust, it not only cannot be compelled to execute it, but it cannot lawfully do so. The trust, however, does not fail, for a court of equity will appoint a competent trustee to execute the same.[120]

[119] United States Trust Co. of New York v. Lee, 73 Ill. 142.

[120] Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127; Jones v. Habersham, 107 U. S. 174, 189; Chapin v. School Dist. No. 2, 35 N. H. 445; Wade v. American Colonization Soc., 7 Smedes & M. (Miss.) 663, 45 Am. Dec. 324; Mason's Ex'rs v. Trustees of Tuckerton M. E. Church, 27 N. J. Eq. 47; Sheldon v. Chappell, 47 Hun (N. Y.) 59; Winslow v. Cummings, 3 Cush. (Mass.) 358.

CHAPTER IX.

POWER TO TRANSFER OR INCUMBER PROPERTY AND FRANCHISES.

§ 152. Power of alienation in general.
153. Power to lease property.
154. Power to mortgage or pledge property.
155. Grant of easement.
156. Dedication to public use.
157. Conveyance or transfer to pay debts.
158. Negotiation or transfer of choses in action.
159. Restrictions upon power of alienation or incumbrance.
160. Power to alienate entire property.
161. Property held subject to limitations or on specified trust.
162. Alienation by quasi public corporation.
163. Alienation or mortgage of franchises or special privileges.
164. Presumption as to validity.
165. Whether purchasers become a corporation.
166. Ratification of transfer or mortgage by the legislature.

§ 152. Power of alienation in general.—A corporation has, as an incident to its ownership of property, real or personal, and including choses in action, the same capacity and power as a natural person to transfer or incumber the same, by absolute sale and conveyance or transfer, lease, mortgage, or pledge, provided the transfer or incumbrance is not prohibited by its charter or by statute, and is not inconsistent with or foreign to the objects for which it was created, and is not contrary to public policy.

Nothing is better settled in the law of corporations than the doctrine that a corporation has the same capacity and power as a natural person to dispose of and convey its property, real or personal,[1] provided it does not do so for a purpose which is

[1] Kyd, Corp. 107, 108; In re Patent File Co., 6 Ch. App. 83, 1 Keener's Cas. 659, 1 Cum. Cas. 322; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 264, 1 Smith's Cas. 189; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 1 Keener's Cas. 730, 2 Cum. Cas. 85; People v. Ballard, 134 N. Y. 26, 1 Keener's Cas. 630; Kean v. Johnson, 9 N. J. Eq. 401, 1 Keener's Cas. 618;

foreign to the objects for which it was created,[2] and provided, further, it violates no charter or statutory restriction,[3] or rule of law based upon public policy.[4] "As a general rule," said Judge Christiancy in a Michigan case, "corporations may be said to have an incidental power to dispose of their property, real and personal, either by sale absolute, or by mortgage or other mode of security, for any debt which they may rightfully contract, to the same extent as natural persons, except so far as that power may be restrained by their charter, by considerations connected with the purposes of their creation, or limited by express provision or just implication of some statute, or by the general policy of the state to be deduced from its legislation."[5] This power need not be expressly conferred upon a corporation by its charter. It is implied as an incident to its ownership of property, unless there is some clear restriction in its charter or in some statute.[6]

Miner's Ditch Co. v. Zellerbach, 37 Cal. 579, 99 Am. Dec. 300; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 518; State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166; Fitch v. Lewiston Steam Mill Co., 80 Me. 34; Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490, 1 Smith's Cas. 243; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Keener's Cas. 650, 1 Smith's Cas. 190, 1 Cum. Cas. 331; Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; City of Detroit v. Mutual Gas Co., 43 Mich. 594; Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; DeGroff v. American Linen Thread Co., 21 N. Y. 124; Yates v. Van De Bogert, 56 N. Y. 526; Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454; Reynolds v. Stark County Com'rs, 5 Ohio, 204; Ardesco Oil Co. v. North American Oil & Min. Co., 66 Pa. St. 375; Burton's Appeal, 57 Pa. St. 213; Uncas Nat. Bank of Norwich v. Rith, 23 Wis. 339; Post v. Beacon Vacuum Pump & Electrical Co. (C. C. A.) 84 Fed. 371; Levering v. Bimel, 146 Ind. 545; Freeman v. Sea View Hotel Co., 57 N. J. Eq. 68; Plant v. Macon Oil & Ice Co., 103 Ga. 666.

[2] Post, §§ 159(d), 160, 161.

A trading or manufacturing corporation has the same power as an individual manufacturer or trader to sell its goods, and to sell to some persons to the exclusion of others. Such a corporation has the same right and power as a natural person engaged in the same business to consign its goods to selling agents, and to impose conditions as to whom they shall sell to, and the terms upon which they shall sell. Stockton v. American Tobacco Co., 55 N. J. Eq. 352, affirmed in Miller v. American Tobacco Co., 56 N. J. Eq. 847.

[3] Post, § 159.

[4] Post, § 162.

[5] Joy v. Jackson & Michigan Plank Road Co., 11 Mich. 164.

[6] See cases cited in note 1, supra, and in the notes following.

§ 153. Power to lease property.

A corporation may not only convey or transfer its property absolutely, subject to the qualifications above stated, but it may also, subject to such qualifications, lease the same.[7] Thus, a railroad company, owning land which is not at the time necessary for the operation of its road, may lease the same to individuals for the purpose of erecting and maintaining an elevator thereon to be used in connection with its road.[8] And a religious, educational, literary, or scientific corporation, or any other kind of corporation, which owns lands and buildings for use in conducting its business, may lease the same or any portion thereof when it is not necessary for the purposes of its business.[9]

On the same principle, it is within the powers of a railroad company to let another company into the joint use and occu-

[7] Simpson v. Directors of Westminster Palace Hotel Co., 8 H. L. Cas. 712; Featherstonhaugh v. Lee Moor Porcelain Clay Co., L. R. 1 Eq. 318; Nye v. Storer, 168 Mass. 53; Temple Grove Seminary v. Cramer, 98 N. Y. 121; Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 130; Phillip v. Aurora Lodge No. 104, I. O. G. T., 87 Ind. 505; Ardesco Oil Co. v. North American Oil & Min. Co., 66 Pa. St. 375.

A corporation for the purpose of carrying on a large department store may let space therein to other persons or corporations for the sale of particular articles, receiving as compensation a certain percentage on all sales made by the others. Standard Fashion Co. v. Siegel-Cooper Co., 44 App. Div. (N. Y.) 121.

A purely private corporation has the power to temporarily lease its property to raise money for payment of a pressing debt, where the transaction is in the interest of all the stockholders, and the corporation has no purpose to permanently abandon its franchises. Plant v. Macon Oil & Ice Co., 103 Ga. 666.

That a corporation cannot lease its property if the lease is inconsistent with its charter, or contrary to express restrictions or public policy, see post, §§ 159(e), 162(b).

When the law permits the charter of a corporation to be extended from time to time, a lease by it for a longer period than that for which it was created is valid. Gere v. New York Central & Hudson River R. Co., 19 Abb. N. C. (N. Y.) 193.

[8] Gilliland v. Chicago & Alton R. Co., 19 Mo. App. 411.

A railroad company owning the fee in land may grant to an oil transportation company, provided its own ability to serve the public is not affected, the right to use the land for laying pipes. Benton v. City of Elizabeth, 61 N. J. Law, 411, 693.

[9] Simpson v. Directors of Westminster Palace Hotel Co., 8 H. L. Cas. 712; Temple Grové Seminary v. Cramer, 98 N. Y. 121; Laford v. Deems, 81 N. Y. 507; Catholic Institute v. Gibbons, 3 Cin. Wkly. Law B. (Ohio) 581; and other cases cited in the second note preceding.

pancy, for a long term of years, of its bridge, and of its station, tracks, and other terminal facilities at a particular city, when such joint use and occupancy does not interfere with its own present or prospective use thereof, or its ability to discharge its duties to the public. "If, in the conduct of its corporate business, a railroad corporation necessarily acquires engines and cars that at certain seasons of the year are not required for its own use, it is not then required to operate them; it is not required to hold them in idleness; it may rent them; it may sell them; and, if it necessarily constructs or acquires for its corporate purposes bridges, tracks, and depots at its terminals whose capacity is greater than its corporate use, the interest of its stockholders and creditors, the value of whose property will be thereby enhanced, and the interest of the public, who will be thereby provided with increased facilities for transportation, alike require that such surplus use shall not be left to idle waste." [10]

A hotel company or other corporation which has constructed a building which is too large for its present need may lease the part which is not needed.* A railroad company owning steamboats for the purpose of maintaining a ferry in connection with its road is not bound to allow them to lie idle when not needed in its business, but may lease them when not in use, and thus avoid their lying unemployed and unprofitable.[11]

A corporation which has the power to sell property may make a lease giving the lessee an option to purchase.[12]

[10] Union Pacific R. Co. v. Chicago, Rock Island & Pac. R. Co. (C. C. A.) 51 Fed. 309, 1 Keener's Cas. 635, affirming 47 Fed. 15.

* Simpson v. Directors of Westminster Palace Hotel Co., 8 H. L. Cas. 712.

A corporation chartered to manufacture railway cars, and authorized to purchase and hold such real estate as may be necessary for the prosecution of its business, and whose business is large and increasing, may purchase land and erect a large office building, in anticipation of its future needs (ante, § 136), and may rent such portions of the same as are not presently needed. People v. Pullman's Palace Car Co., 175 Ill. 125.

[11] Forrest v. Manchester, Sheffield & L. Ry. Co., 30 Beav. 46; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326, 1 Keener's Cas. 472.

[12] In re Female Orphan Asylum, 17 Law T. (N. S.) 59.

§ 154. Power to mortgage or pledge property.

The power of alienation also includes the power to incumber. In the absence of charter or statutory restrictions,[13] and provided no rule of public policy is violated,[14] a corporation has the same power as a natural person to mortgage or pledge its property, real or personal, as security for any debt which it may lawfully contract, whether the debt has been contracted in the past or is contracted at the time of the mortgage or pledge.[15] And when a corporation has the power to borrow money and secure repayment by a mortgage or pledge of its property, it may lawfully mortgage or pledge property as security for future advances.[16] The power to mortgage or pledge property is im-

[13] Post, § 159.

[14] Post, § 162.

[15] In re Patent File Co., 6 Ch. App. 83, 1 Keener's Cas. 659, 1 Cum. Cas. 322; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 264, 1 Smith's Cas. 189; Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 1 Keener's Cas. 656, 1 Cum. Cas. 326; Jackson v. Brown, 5 Wend. (N. Y.) 590, 1 Keener's Cas. 648; Hendee v. Pinkerton, 14 Allen (Mass.) 381, 1 Keener's Cas. 653, 1 Cum. Cas. 336; Leo v. Union Pacific Ry. Co., 17 Fed. 273; Allen v. Montgomery R. Co., 11 Ala. 437; State v. Rice, 65 Ala. 83; Taylor v. Agricultural & Mechanical Ass'n, 68 Ala. 229; Hopson v. Aetna Axle & Spring Co., 50 Conn. 597; West v. Madison County Agricultural Board, 82 Ill. 205; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; Thompson v. Lambert, 44 Iowa, 244; Warfield v. Marshall County Canning Co., 72 Iowa, 666, 2 Am. St. Rep. 263; Bardstown & Louisville R. Co. v. Metcalf, 4 Metc. (Ky.) 206, 81 Am. Dec. 541; Susquehanna Bridge & Bank Co. v. General Ins. Co., 3 Md. 305, 56 Am. Dec. 740; Swift v. Smith, 65 Md. 428, 57 Am. Rep. 336; Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Joy v. Jackson & Michigan Plank Road Co., 11 Mich. 155; City of Detroit v. Mutual Gas Light Co., 43 Mich. 594; Eureka Iron & Steel Works v. Bresnahan, 60 Mich. 332; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Amerman v. Wiles, 24 N. J. Eq. 13; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280; Duncomb v. New York, Housatonic & N. R. Co., 84 N. Y. 190; King v. Merchants' Exchange Co., 5 N. Y. 547; Nelson v. Eaton, 26 N. Y. 410; Beebe v. Richmond Light, Heat & Power Co., 13 Misc. Rep. (N. Y.) 737; Antietam Paper Co. v. Chronicle Pub. Co., 115 N. C. 143; Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454; Burt v. Rattle, 31 Ohio St. 116; Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Burr's Ex'r v. McDonald, 3 Grat. (Va.) 215; Lehigh Valley Coal Co. v. West Depere Agricultural Works, 63 Wis. 45; Union Trust Co. v. Mercantile Library Hall Co., 189 Pa. St. 263; New Britain Nat. Bank v. A. B. Cleveland Co., 158 N. Y. 722, affirming 91 Hun, 447; Bell & Coggeshall Co. v. Kentucky Glass Works Co. (Ky.) 50 S. W. 2, modifying 48 S. W. 440.

[16] Jones v. Guaranty & Indemni-

plied in the absence of restrictions, and need not be expressly conferred, as has sometimes been contended.[17] "The power to mortgage, when not expressly given or denied, must be regarded as an incident to the power to acquire and hold real estate and make contracts."[18]

A corporation may mortgage its property by giving an absolute conveyance or bill of sale as security.[19] And it may mortgage or pledge future earnings, as well as property already acquired.[20]

A grant of authority to a corporation to mortgage its property to secure the payment of any debt authorizes a mortgage to secure a debt contracted at the time, or a debt to be contracted at a future time,—as a mortgage to secure the payment of bonds to be afterwards issued,—as well as debts previously contracted.[21]

§ 155. Grant of easement.

A corporation may grant an easement, as a right of way over its property, provided the grant is not inconsistent with its charter, but not otherwise. Thus, it has been held that an incorporated Odd Fellows association, which is authorized by its charter to buy and hold real estate for the use and occupation of the lodges, and which has erected a building for such purposes, and rented the lower floor for stores, may grant to another person the right to use an alley across the premises in consideration of benefits received.[22]

ty Co., 101 U. S. 622, 1 Keener's Cas. 656, 1 Cum. Cas. 326.

[17] In re Patent Fire Co., 6 Ch. App. 83, 1 Keener's Cas. 659, 1 Cum. Cas. 322; and other cases cited in note 15, supra.

[18] Aurora Agricultural & Horticultural Society v. Paddock, 80 Ill. 264, 1 Smith's Cas. 189.

[19] Shears v. Jacob, L. R. 1 C. P. 513; Deffell v. White, L. R. 2 C. P. 144.

[20] Boykin v. Shaffer, 13 La. Ann. 129.

Where a statute, however, provides that a mortgage can embrace "only property in possession or to which the mortgagor has the right of possession at the time," express legislative authority is necessary to enable a corporation to make a valid mortgage upon its income. Lubroline Oil Co. v. Athens Savings Bank, 104 Ga. 376.

[21] Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547, in effect overruling to this extent Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43. See post, § 159(a).

[22] Odd Fellows' Ass'n v. Hegele, 24 Or. 16.

It can make no difference with respect to the validity of a corporation's grant of an easement in or over its land that the grantee is to use the land for a purpose which is not within the powers of the corporation. Thus it has been held that a railroad company, owning the fee in land, may grant to an oil transportation company the right to use the land for laying its pipes, if such use does not interfere with the performance of its duties to the public; and that it can make no difference that the railroad company itself would have no power to lay pipes for the transportation of oil.*

It has been held, however, that a railroad company cannot grant an easement of a footway, for persons to walk along, not across, its roadbed or tracks.[23]

§ 156. Dedication to public use.

A corporation also has the same power as other proprietors to dedicate part of its land to public use, as for a public highway, for example, unless it is restrained by its charter. This is true, not only of railroad companies,[24] but also of land, canal, bridge, and cemetery companies, agricultural societies, and all other corporations owning real property.[25]

§ 157. Conveyance or transfer to pay debts.

There can be no doubt that a corporation has the power to convey or transfer any part or all of its property when necessary

* Benton v. City of Elizabeth, 61 N. J. Law, 411, 693.

A railroad company may let another company into the joint use and occupancy of its bridge, tracks, depots, and other terminal facilities. Union Pac. Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co. (C. C. A.) 51 Fed. 309, 1 Keener's Cas. 635, affirming 47 Fed. 15. See ante, § 153.

[23] Sapp v. Northern Cent. Ry. Co., 51 Md. 115. And see Ohio & Mississippi R. Co. v. Indianapolis & Cincinnati R. Co., 5 Am. Law Reg. (N. S.) 733.

[24] Green v. Town of Canaan, 29 Conn. 157; Williams v. New York & New Haven R. Co., 39 Conn. 519; People v. Eel River & Eureka R. Co., 98 Cal. 665; Skjeggerud v. Minneapolis & St. Louis Ry. Co., 38 Minn. 56; Missouri Pac. Ry. Co. v. Lee, 70 Tex. 496.

[25] Proprietors of Grand Surrey Canal v. Hall, 1 Man. & G. 392; Logan v. Rose, 88 Cal. 263; Los Angeles Cemetery Ass'n v. City of Los Angeles, 95 Cal. 420; Hammerslough v. City of Kansas City, 46 Kan. 37; Proprietors of Canal Bridge v. Gordon, 1 Pick. (Mass.) 297, 11 Am. Dec. 170; Union Co v. Peckham, 16 R. I. 64.

to pay debts lawfully contracted by it.[26] And for this purpose it has the same power as a natural person to make an assignment in trust for the benefit of its creditors, provided there is no charter or statutory restriction in the way.[27] The power to make an assignment, including the effect of statutory provisions on the subject, and the right to prefer creditors, will be more fully discussed when we come to deal with the relations existing between a corporation and its creditors.[28]

§ 158. Negotiation or transfer of choses in action.

A corporation which has received bills, notes, bonds, or other choses in action in the course of its business has the same power as a natural person to negotiate or assign the same, provided it does so for a legitimate corporate purpose, and violates no express restrictions in its charter.[29] And it may assign or transfer them as collateral security for any debt lawfully contracted.[30] It may assign a mortgage held by it, for the purpose of securing a debt lawfully contracted, or to raise funds, or for any other legitimate purpose.[31] And, subject to some qualifica-

[26] Hancock v. Holbrook, 4 Woods, 52, 9 Fed. 353; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Manufacturers' Sav. Bank v. Big Muddy Iron Co., 97 Mo. 38; DeRuyter v. St. Peter's Church, 3 N. Y. 238; Everson v. Eddy, 36 N. Y. St. Rep 763; Stetson v. City Bank of New Orleans, 12 Ohio St. 577; Klosterman v. Mason County Cent. R. Co., 8 Wash. 281.

[27] Pope v. Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; McCallie v. Walton, 37 Ga. 611, 95 Am. Dec. 369; Chew v. Ellingwood, 86 Mo. 260, 56 Am. Rep. 429; Warner v. Mower, 11 Vt. 385. And see post, chapter xxv.

[28] Post, chapter xxv.

[29] Planters' Bank of Mississippi v. Sharp, 6 How. (U. S.) 302; McIntire v. Preston, 10 Ill. 48, 48 Am. Dec. 321; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Northampton Bank v. Pepoon, 11 Mass. 288; Hallowell & Augusta Bank v. Hamline, 14 Mass. 178; Alexander v. Rollins, 84 Mo. 657; Gillett v. Campbell, 1 Denio (N. Y.) 520; Bank of Genesee v. Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Wood v. Wellington, 30 N. Y. 218; Uncas Nat. Bank of Norwich v. Rith, 23 Wis. 339. Contra, Payne v. Baldwin, 3 Smedes & M. (Miss.) 661; McIntire v. Ingraham, 35 Miss. 25.

[30] In re Regent's Canal Iron Works Co., 3 Ch. Div. 43; Farmers' Loan & Trust Co. v. Toledo & South Haven R. Co., 54 Fed. 759; Ward v. Johnson, 95 Ill. 215; Androscoggin R. Co. v. Auburn Bank, 48 Me. 335; Fifth Ward Sav. Bank of Jersey City v. First Nat. Bank of Jersey City, 48 N. J. Law, 513; Brookman v. Metcalf, 32 N. Y. 591; Nelson v. Eaton, 26 N. Y. 410; Duncomb v. New York, Housatonic & N. R. Co., 84 N. Y. 190; Uncas Nat. Bank v. Rith, 23 Wis. 339.

[31] Gillett v. Campbell, 1 Denio

tions, it may sell, mortgage, or pledge unpaid subscriptions to its capital stock.[32]

§ 159. Restrictions upon power of alienation or incumbrance.

(a) In general.—A corporation, of course, cannot lawfully sell, convey, lease, mortgage, or pledge its property in violation of an express prohibition or restriction in its charter or in a statute.[33] But restrictions upon a corporation's power of alienation are not to be extended, unless by necessary implication, beyond the language of the statute. Nor are they to be implied from doubtful language. Thus, a prohibition against alienation of property received for a particular purpose does not prohibit alienation of property received for some other purpose.[34] And a prohibition against a sale of its property by a corporation does not prohibit a mortgage to secure a *bona fide* debt.[35] A special grant to a corporation of power to mortgage its property for a particular purpose does not impliedly take away its general power to execute a mortgage to secure its debts.[36] Nor does a grant of power to mortgage its property and franchise impliedly take away its power to pledge property.[37]

A prohibition against the mortgaging of its property by a

(N. Y.) 520; Detweiler v. Breckenkamp, 83 Mo. 45; Uncas Nat. Bank v. Rith, 23 Wis. 339.

[32] Post, § 501.

[33] See Saltmarsh v. Spaulding, 147 Mass. 224; Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43; Rochester Sav. Bank v. Averell, 96 N. Y. 467; Lord v. Yonkers, Fuel Gas Co., 99 N. Y. 547.

The New York statute limiting corporate mortgages to the amount of the stock or to two-thirds of the value of the property does not authorize a mortgage to secure an issue of bonds in excess of such limit, although the excess is not to be actually issued until some future date, and upon the further consent of two-thirds of the stockholders. Flynn v. Coney Island & Brooklyn R. Co., 26 App. Div. (N. Y.) 416.

[34] Douglass v. Union Mutual Ins. Co., 127 Ill. 102. In this case it was held that a clause in the charter of a university, that "no gifts, grants, or devises made to the university for a particular purpose" should "be applied to any other purpose," had reference only to donations in aid of the accomplishment of a special object, as to endow a chair, as distinguished from aid to the university generally, and that it did not prohibit the alienation of land conveyed to it for no particular purpose.

[35] Middleton Sav. Bank v. City of Dubuque, 15 Iowa, 394; Krider v. Trustees of Western College, 31 Iowa, 547.

[36] Allen v. Montgomery R. Co., 11 Ala. 438; Mobile & Cedar Point R. Co. v. Talman, 15 Ala. 472.

[37] Uncas Nat. Bank v. Rith, 23 Wis. 339.

corporation applies only to property which it owns, and does not prohibit the corporation from purchasing property and giving a mortgage thereon to secure the price.[38]

Power conferred upon a corporation to mortgage its property to secure the payment of any debt which may be contracted by it in its legitimate business is not limited to debts contracted before the mortgage is given, but authorizes a mortgage to secure a debt simultaneously contracted,[39] or to secure future advances.[40] And it authorizes a mortgage to secure a loan of money to pay debts of the corporation, where the money is so applied.[41]

(b) Leave of court.—When a charter or statute prohibits the alienation or mortgage of its property by a corporation, or a particular kind of corporation, except with the consent of a court, a valid conveyance or mortgage cannot be made without such consent.[42]

(c) Consent of stockholders.—In some states it is held that where the charter of a corporation or a statute prohibits a conveyance, mortgage, or pledge of its property without the consent of the stockholders, or of a certain proportion of them, such consent is essential to the validity of a conveyance, mortgage, or pledge.[43] In other states it is held that the prohibition is intended merely for the benefit of the stockholders, that it does not render a mortgage or conveyance without their consent void, but merely makes it voidable, and that another cannot attack a conveyance, mortgage, or pledge for want of their consent.[44]

[38] McMurray v. St. Louis Oil Mfg. Co., 33 Mo. 377.

[39] Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547.

[40] Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 1 Keener's Cas. 656, 1 Cum. Cas. 322.

[41] Rochester Sav. Bank v. Averell, 96 N. Y. 467.

[42] Madison Ave. Baptist Church v. Oliver St. Baptist Church, 73 N. Y. 82; Congregation Beth Elohim v. Central Presbyterian Church, 10 Abb. Pr. (N. S., N. Y.) 484; Dudley v. Congregation of Third Order of St. Francis, 138 N. Y. 451.

[43] Pekin Mining & Milling Co. v. Kennedy, 81 Cal. 356; McShane v. Carter, 80 Cal. 310.

[44] Barrett v. Polak Co., 108 Ala. 390; Alabama Iron & Steel Co. v. McKeever, 112 Ala. 134; Nelson v. Hubbard, 96 Ala. 238; Beecher v. Marquette & Pac. Rolling Mill Co., 45 Mich. 103; Bishop v. Kent & Stanley Co., 20 R. I. 680; G. V. B. Mining Co. v. First Nat. Bank of Hailey (C. C. A.) 95 Fed. 23, modifying 89 Fed. 439.

(d) **Unauthorized purpose.**—A corporation has no power to transfer, mortgage, or pledge its real or personal property for a purpose which is inconsistent with or foreign to the objects for which it was created.[45] Thus, a railroad company, authorized by its charter to construct and operate a road between certain termini only, cannot lawfully use its funds to extend its road beyond such termini.[46] And a corporation cannot lawfully pay the expenses of a suit not instituted by it, even though it may be incidentally benefited by the suit.[47] A corporation cannot lawfully mortgage or pledge its property for the individual debt of an officer or stockholder for which it is not in any way liable.*

(e) **Unauthorized lease.**—A corporation has no power to lease its property when the lease is inconsistent with its charter and the object for which it was created.[48] Nor can it lease its property on other terms than those, if any, specified in its charter.[49]

(f) **Gifts.**—Ordinarily, a gift of its property by a corporation not created for charitable purposes is in violation of the rights of its stockholders, and is *ultra vires,* however worthy of

[45] East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Cum. Cas. 142; Kean v. Johnson, 9 N. J. Eq. 401, 1 Keener's Cas. 608; Rabe v. Dunlap, 51 N. J. Eq. 40; Smith v. St. Louis Mutual Life Ins. Co., 2 Tenn. Ch. 727; Stevens v. Rutland & Burlington R. Co., 29 Vt. 545.

A statute authorizing a corporation to mortgage, sell, and convey its property is not to be construed as authorizing a mortgage for a purpose which is foreign to the objects of the corporation. Thus it does not give a corporation power to mortgage its property without consideration to secure the individual debt of a stockholder on which the other stockholders are sureties. Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165.

A mortgage by a business corporation of all its property to secure its creditors does not violate a statute prohibiting such a corporation from mortgaging its property for any other than the legitimate purposes of its business. New Britain Nat. Bank v. A. B. Cleveland Co., 158 N. Y. 722, affirming 91 Hun, 447.

[46] Baltimore United Fire Dept. v. Creamer, 17 Md. 243; Stevens v. Rutland & Burlington R. Co., 29 Vt. 545.

[47] Kernaghan v. Williams, L. R. 6 Eq. 228. See post, § 191.

* Wheeler v. Home Savings & State Bank, 188 Ill. 34.

[48] Dow v. Northern R. Co., 67 N. H. 1; Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27; Metropolitan Concert Co. v. Abbey, 52 N. Y. Super. Ct. 97.

[49] Taylor v. Dulwich Hospital in Surrey, 1 P. Wms. 655.

encouragement or aid the object of the gift may be.[50] Thus, it has been held that it is *ultra vires* for a national bank to make a donation for the purpose of inducing a manufacturing company not to remove its plant from the city,[51] or for a railroad company to subscribe for the erection of an institute on the line of its road,[52] or for an insurance company to voluntarily pay an ex-president a large sum of money for past services, which it is under no legal duty to pay, and which would not constitute a legal consideration for a promise to pay.[53]

There may be circumstances, however, under which a gift of property by a corporation would be a legitimate means of increasing or carrying on its business, and in such a case it would not be *ultra vires*. It has been held, for example, that an insurance company, for the purpose of increasing its business, may properly pay a customer a loss not covered by his policy, and for which it could not be held liable;[54] that a corporation may pay extra wages to its workmen or other employes out of its undivided profits, for the purpose of advancing its interests,[55] or may pay a pension for several years to the family of a deceased officer;[56] that a railroad company may pay for the services of a physician and nurse for an employe injured in the course of his employment;[57] and that a manufacturing company may give away some of its goods for the purpose of advertising.[58]

It has also been held that a literary society, having authority to buy and sell land for the purpose of sustaining and carrying

[50] Davis v. Old Colony R. Co., 131 Mass. 271, 41 Am. Rep. 221, 1 Smith's Cas. 564, 1 Keener's Cas. 457, 1 Cum. Cas. 173; Beers v. New York Life Ins. Co., 66 Hun (N. Y.) 75; McCrory v. Chambers, 48 Ill. App. 445; Polar Star Lodge No. 1 v. Polar Star Lodge No. 1, 16 La. Ann. 53.

[51] McCrory v. Chambers, 48 Ill. App. 445. See, also, Holt v. Winfield Bank, 25 Fed. 812.

[52] Tomkinson v. Southeastern Ry. Co., 35 Ch. Div. 677.

[53] Beers v. New York Life Ins. Co., 66 Hun (N. Y.) 75.

[54] Taunton v. Royal Ins. Co., 2 Hem. & M. 135.

[55] Hampson v. Price's Patent Candle Co., 45 Law J. Ch. 437. And see Hutton v. West Cork Ry. Co., 23 Ch. Div. 654.

[56] Henderson v. Bank of Australasia, 40 Ch. Div. 170.

[57] Toledo, Wabash & W. Ry. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484.

[58] Steinway v. Steinway & Sons, 17 Misc. Rep. (N. Y.) 43.

on its institution of learning, may make a donation to a railroad company to aid in the construction of its road, where the road will benefit the society by giving a means of access for persons and supplies, and for shipping the produce of its land;[59] and that a land company may make a donation for the purpose of procuring the erection of a college,[60] or the construction of a railroad[61] or bridge.[62] And according to the better opinion, though there is a decision of the Massachusetts court to the contrary, hotel or trading companies, street-railroad companies, and other corporations whose business will be increased by the holding of a convention, fair, festival, or the like, in the place in which they are located, may donate money or property towards the payment of the expenses of the same.[63]

§ 160. Power to alienate entire property.

(a) In general.—A purely private business corporation, like a manufacturing or trading company, which is not given the right of eminent domain, and which owes no special duties to the public, may certainly sell and convey absolutely the whole of its property, when the exigencies of its business require it to do so, or when the circumstances are such that it can no longer profitably continue its business,[64] provided the trans-

[59] Louisville & Nashville R. Co. v. St. Rose Literary Soc., 91 Ky. 395.

[60] Whetstone v. Ottawa University, 13 Kan. 320; Sherman Center Town Co. v. Russell, 46 Kan. 382.

[61] Vandall v. South San Francisco Dock Co., 40 Cal. 83; McGeorge v. Big Stone Gap Imp. Co., 57 Fed. 262.

[62] Ft. Worth City Co. v. Smith Bridge Co., 151 U. S. 294.

[63] Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234; Temple St. Cable Ry. Co. v. Hellman, 103 Cal. 634; State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407, 17 Am. Rep. 702. Contra, Davis v. Old Colony R. Co., 131 Mass. 271, 41 Am. Rep. 221, 1 Smith's Cas. 564, 1 Keener's Cas. 457, 1 Cum. Cas. 173.

That a manufacturing and trading company may subscribe a sum of money to procure the location of a postoffice near its building was held in B. S. Green Co. v. Blodgett, 55 Ill. App. 556, 159 Ill. 169, 50 Am. St. Rep. 146.

[64] Featherstonhaugh v. Lee Moor Porcelain Clay Co., L. R. 1 Eq. 318; Wilson v. Miers, 10 C. B. (N. S.) 348; Miners' Ditch Co. v. Zellerbach, 37 Cal. 579, 99 Am. Dec. 300; Warfield v. Marshall County Canning Co., 72 Iowa, 666, 2 Am. St. Rep. 263; Price v. Holcomb, 89 Iowa, 123; State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Treadwell v. Salis-

action is not in fraud of the rights of creditors,[65] or in violation of charter or statutory restrictions.[66] And, by the weight of authority, this may be done by a majority of the stockholders against the dissent of the minority.[67]

As was said of such a transfer by a ditch company in a leading California case: "The very idea of private property, in which the public has no rights, involves the idea of the right to sell and convey when the exigencies of the corporation require it. If a corporation could convey a part, it could convey the whole. The enterprise of the Miners' Ditch Company may have proved unprofitable, and rendered it necessary to dispose of its assets and wind up the concern, as the only means of avoiding insolvency. It might be necessary to sell and convey a part or the whole of its property, in order to raise means to pay its debts and avoid a sacrifice by forced sale. In either event, the sale and conveyance of the property, with these objects in view, would be a lawful purpose of the corporation. Although the object for which it was formed was to construct a ditch, and convey water for sale to miners and for mechanical purposes, there was no obligation resting on the corporation to pursue this object after it became evident that the enterprise would be unprofitable and result in insolvency or loss. When

bury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490, 1 Smith's Cas. 243; Dupee v. Boston Water Power Co., 114 Mass. 37, 2 Smith's Cas. 974; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 1 Keener's Cas. 730, 2 Cum. Cas. 85; Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 130; Post v. Beacon Vacuum Pump & Electrical Co. (C. C. A.) 84 Fed. 371; Bartholomew v. Derby Rubber Co., 69 Conn. 521, 61 Am. St. Rep. 57. Contra, Cass v. Manchester Iron & Steel Co., 9 Fed. 640. And compare Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336; and post, § 194(e).

[65] Chattanooga, Rome & C. R. Co. v. Evans, 31 U. S. App. 432, 66 Fed. 809; Blair v. St. Louis, Hannibal & K. R. Co., 22 Fed. 36; Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Hancock v. Holbrook, 40 La. Ann. 53; post, § 342(i).

[66] Ante, § 159.

[67] Wilson v. Meiers, 10 C. B. (N. S.) 348; Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490, 1 Smith's Cas. 243; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Sewell v. East Cape May Beach Co., 50 N. J. Eq. 717; Price v. Holcomb, 89 Iowa, 123. And see Hodges v. New England Screw Co., 1 R. I. 347, 53 Am. Dec. 624. See, also, Warfield v. Marshall County Canning Co., 72 Iowa, 666, 2 Am. St. Rep. 263; Bartholomew v. Derby Rubber Co., 69 Conn. 521, 61 Am. St. Rep. 57. See post, chapter xxiv.

such a result appears to be unavoidable, obviously the only mode by which the interests of the parties and of the public could be subserved would be to dispose of its assets in the most advantageous way, and pay off its debts, with a view to winding up the affairs of the corporation with the least possible loss."[68]

A sale of all its property by a corporation, although it may terminate its business, does not dissolve the corporation;[69] and therefore, when it is necessary for the interests of the stockholders, it is not prohibited by a statute providing that no corporation can be dissolved prior to the period fixed in the articles of incorporation except by unanimous consent, unless a different rule has been adopted in the articles.[70]

(b) When not required by the exigencies of the business.—A majority of the stockholders of a corporation have no power to sell and convey the entire property of the corporation, and discontinue its business, against the dissent of the minority, if the sale is not required by the exigencies of its business; and, if they attempt to do so, a dissenting stockholder may maintain a suit to enjoin the transfer.[71]

(c) Leases.—What has been said in the paragraphs preceding applies to leases as well as to absolute conveyances. A majority of the stockholders of a corporation may lease the entire

[68] Miners' Ditch Co. v. Zellerbach, 37 Cal. 579, 99 Am. Dec. 300.

[69] Post, § 310.

[70] Price v. Holcomb, 89 Iowa, 123; Warfield v. Marshall County Canning Co., 72 Iowa, 666, 2 Am. St. Rep. 263.

[71] Kean v. Johnson, 9 N. J. Eq. 401, 1 Keener's Cas. 608; People v. Ballard, 134 N. Y. 269, 1 Keener's Cas. 630; Ernest v. Nicholls, 6 H. L. Cas. 401; Bird v. Bird's Patent Deodorizing & Utilizing Sewage Co., 9 Ch. App. 358; Simpson v. Directors of Westminster Palace Hotel Co., 8 H. L. Cas. 712; Elyton Land Co. v. Dowdell, 113 Ala. 177, 59 Am. St. Rep. 105; Morris v. Elyton Land Co. (Ala.) 28 South. 513; State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166; Small v. Minneapolis Electro-Matrix Co., 45 Minn. 264; Copeland v. Citizens' Gas Light Co., 61 Barb. (N. Y.) 60; McCurdy v. Myers, 44 Pa. St. 535; Bailliet v. Brown, 103 Pa. St. 546; Boston & Providence R. Corp. v. New York & New England R. Co., 13 R. I. 260; Easun v. Buckeye Brewing Co., 51 Fed. 156; Taylor v. Earle, 8 Hun (N. Y.) 1; Abbot v. American Hard Rubber Co., 33 Barb. (N. Y.) 578; Frothingham v. Barney, 6 Hun (N. Y.) 366.

"All the authorities in this state," said the New York court of

property of the corporation whenever the exigencies of the business require such a lease.[72] But they cannot do so against the dissent of the minority when it is not required by the exigencies of the business.[73]

§ 161. Property held subject to limitations or on a specified trust.

If a corporation holds property, not absolutely, but subject to limitations as to its use, or on a specified trust, it cannot so dispose of it as to divert it from such use or trust.[74] Thus, it has been held that a railroad company which has taken land under the power of eminent domain for the location of its road cannot sell or lease the same to private manufacturers or traders for their private use.[75] And corporations created for the purpose of establishing and maintaining a hospital, college, seminary, or other similar institution, and to which real or personal property has been donated for such purpose, cannot dispose of the same in violation of the trust upon which it was received.[76] The same is true of corporations created for re-

appeals, "are uniform in holding that the trustees of a corporation cannot so dispose of its property as to virtually end its existence and prevent it from carrying on the business for which it was incorporated." People v. Ballard, 134 N. Y. 269, 296, 1 Keener's Cas. 630.

[72] Featherstonhaugh v. Lee Moor Porcelain Clay Co., L. R. 1 Eq. 318.

A lease of the entire property of a corporation for a term of years, made in good faith and without any element of fraud, actual or constructive, the lessee agreeing to continue the business which the corporation was organized to carry on, is not ultra vires, where the corporation is in such a condition that the business cannot be carried on profitably under its management. Bartholomew v. Derby Rubber Co., 69 Conn. 521, 61 Am. St. Rep. 57. See, also, Plant v. Macon Oil & Ice Co., 103 Ga. 666.

[73] Small v. Minneapolis Electro-Matrix Co., 45 Minn. 264; Copeland v. Citizens' Gas Light Co., 61 Barb. (N. Y.) 60.

A lease by the directors of a corporation organized to acquire mineral lands, and mine the same, of the lands acquired by it, for which it has given all its stock, and on which it has expended all contributions to its treasury, is a practical abandonment of its purposes for the period of the lease, and cannot be made without the unanimous consent of the stockholders. Hennessy v. Muhleman, 27 Misc. Rep. (N. Y.) 232.

[74] Binney's Case, 2 Bland (Md.) 142.

[75] Proprietors of Locks & Canals on Merrimack River v. Nashua & Lowell R. Co., 104 Mass. 1. See, also, Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; post, § 162.

[76] Mott v. Danville Seminary, 129 Ill. 403. And see Hillsdale College v. Rideout, 82 Mich. 94; McBride v. Porter, 17 Iowa, 203.

ligious purposes, and of any other corporation to which property has been conveyed, devised, or bequeathed in trust for a specified purpose.[77]

§ 162. Alienation by quasi public corporations.

(a) In general.—The doctrine that a corporation has the power to alienate or incumber its property does not apply to the full extent to *quasi* public corporations, like railroad companies, for example, which are given the power of eminent domain, and which owe special duties to the public. Unless expressly authorized by its charter, such a corporation cannot convey or transfer property which it has acquired by the exercise of the power of eminent domain, or which is necessary to enable it to properly perform its duties to the public. Such a conveyance violates its contract with the state, and is contrary to public policy and void.[78]

"Corporations possessing and exercising the right of eminent domain," said the Maine court in a late case, "owe duties to the public from the performance of which they are not allowed to escape by a sale or lease of their franchises, without first

[77] See McBride v. Porter, 17 Iowa, 203; Proprietors of Staffordshire & W. Canal Nav. v. Proprietors of Birmingham Canal Nav., L. R. 1 H. L. 254; Proprietors of Rochdale Canal Co. v. Radcliffe, 18 Q. B. 287.

[78] East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142; Shrewsbury & Birmingham Ry. Co. v. Northwestern Ry. Co., 6 H. L. Cas. 113; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44; Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Keener's Cas. 650, 1 Smith's Cas. 190, 1 Cum. Cas. 331; Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164; St. Louis, Vandalia & T. H. R. Co. v. Terre Haute & Indianapolis R. Co., 145 U. S. 393, 2 Cum. Cas. 78, 1 Smith's Cas. 472; American Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary (U. S.) 188, 1 Fed. 745, 1 Cum. Cas. 284, 1 Smith's Cas. 469; Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 2 Am. St. Rep. 124; State v. Consolidation Coal Co., 46 Md. 1; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 399; Abbott v. Johnstown, G. & K. Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Susquehanna Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 35 Am. St. Rep. 385, 1 Keener's Cas. 641; Dow v. Northern Railroad, 67 N. H. 1; Memphis & Charleston R. Co. v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69. And see the other cases more specifically cited in the notes following.

obtaining the consent of the legislature. The franchise of a corporation having the right to receive tolls may be levied on to satisfy an execution against the corporation, and in this way it may be deprived of its corporate powers and privileges. And they may be lost by the foreclosure of a legally executed mortgage. And they may also be lost by laches in reclaiming them when they have been illegally sold, leased, or assigned. But subject to these well-defined exceptions, it is now settled by an overwhelming weight of authority that public or *quasi* public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public, as well as to their stockholders; and that they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority."*

This principle applies to all corporations which are given the power of eminent domain or other special privileges, and which, in return therefor, are under a special duty to serve the public,—as ordinary railroad companies,[79] street-railroad com-

*Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 35 Am. St. Rep. 385, 1 Keener's Cas. 641.

[79] East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142; Shrewsbury & Birmingham Ry. Co. v. Northwestern Ry. Co., 6 H. L. Cas. 113; Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164; St. Louis, Vandalia & T. H. R. Co. v. Terre Haute & Indianapolis R. Co., 145 U. S. 393, 2 Cum. Cas. 78, 1 Smith's Cas. 472; Memphis & Charleston R. Co. v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69; Pueblo & Arkansas Valley R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512; Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Smith's Cas. 190, 1 Keener's Cas. 650, 1 Cum. Cas. 331; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Middlesex R. Co. v. Boston & Chelsea R. Co., 115 Mass. 347; Freeman v. Minneapolis & St. Louis Ry. Co., 28 Minn. 443; Stockton v. Central R. Co., 50 N. J. Eq. 54; Abbott v. Johnstown, G. & K. Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Coe v. Columbus, Piqua & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Lakin v. Willamette Valley & Coast R. Co., 13 Or. 436, 57 Am. Rep. 25; Plymouth R. Co. v. Colwell, 39 Pa. St. 337, 1 Smith's Cas. 194; Harmon v. Columbia & Greenville R. Co., 28 S. C. 401, 13 Am. St. Rep. 686; Frazier v. East Tennessee, Virginia & G. R. Co., 88 Tenn. 138; Gulf, Colorado & S. F. Ry. Co. v. Morris, 67 Tex. 692; Fisher v. West Virginia & Pittsburg R. Co., 39 W. Va. 366.

panies,[80] sleeping-car companies,[81] canal companies,[82] water companies,[83] gas and electric light companies,[84] cemetery companies,[85] and the like. But it does not apply to purely private corporations which are not vested with the power of eminent domain or other special privileges, and which owe no special duties to the public, although their business may in a sense be public. Thus, it does not apply to a gaslight company which is not given the power of eminent domain or other special or exclusive privileges,[86] or a corporation engaged in a general storage and elevator business, with the power to issue warehouse receipts, advance money, etc.[87]

(b) Leases.—This rule applies to leases as well as to absolute sales and conveyances. Corporations which are within the principle cannot make a valid lease of property which is necessary to enable them to carry on their business, and thus temporarily render themselves wholly or partially unable to perform the duties which they owe to the public.[88]

[80] Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Middlesex R. Co. v. Boston & Chelsea R. Co., 115 Mass. 347; Abbott v. Johnstown, G. & K. Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Doane v. Chicago City Ry. Co., 51 Ill. App. 353.

[81] Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44.

[82] Susquehanna Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315; Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 399.

Compare, however, State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166, where it was held that a corporation having power under its charter to construct and operate a canal for irrigation, water works, and manufacturing purposes, might, with the assent of its stockholders, lawfully sell and convey to another corporation its right of way, canal, and other real and personal property, provided the transfer was in good faith, and not with intent to hinder, delay, or defraud creditors.

[83] Foster v. Fowler, 60 Pa. St. 27.

[84] Visalia Gas & Electric Light Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 35 Am. St. Rep. 385; Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 2 Am. St. Rep. 124; Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396; Bath Gas-Light Co. v. Claffy, 74 Hun (N. Y.) 638. But see Com. v. Lowell Gas Light Co., 12 Allen (Mass.) 75; Evans v. Boston Heating Co., 157 Mass. 37; City of Detroit v. Mutual Gas Co., 43 Mich. 594.

[85] Wolford v. Crystal Lake Cemetery Ass'n, 54 Minn. 440.

[86] Hunt v. Memphis Gas Light Co., 95 Tenn. 136.

[87] Girard Point Storage Co. v. Southwork Foundry Co., 105 Pa. St. 248.

[88] East Anglian Ry. Co. v. East-

(c) **Mortgages.**—The principle also applies to a mortgage of its property by such a corporation, for, as was said by Judge Hoar in a Massachusetts case, "the power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure."[89]

(d) **Easement.**—And it applies also to the grant of an easement. A railroad company, for example, cannot grant a right of way or other easement in the land necessary for the operation of its road, if the easement will interfere with the performance of its duties to the public.[90]

(e) **Transactions to which the rule does not apply.**—The rule that a *quasi* public corporation cannot alienate, lease, or mortgage property which is necessary to enable it to perform its duty to the public does not prevent such a corporation, which is given an exclusive privilege, from surrendering its right to exclude others from exercising such a privilege, provided it does not bind itself not to continue its business, for the exclusiveness of the privilege is not for the benefit of the public, but for the benefit of the corporation.[91] Nor does the rule apply to a contract by which such a corporation permits another corporation to use its property, as a railroad, bridge, or canal, jointly with it, as such use does not interfere with the performance of its duties to the public.[92]

ern Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142; Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44; American Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary (U. S.) 188, 1 Fed. 745, 1 Cum. Cas. 284, 1 Smith's Cas. 469.

See, also, Shrewsbury & Birmingham Ry. Co. v. Northwestern Ry. Co., 6 H. L. Cas. 113; Memphis & Charleston R. Co. v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 35 Am. St. Rep. 385, 1 Keener's Cas. 641; Dow v. Northern Railroad, 67 N. H. 1.

[89] Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Smith's Cas. 190, 1 Keener's Cas. 650, 1 Cum. Cas. 331.

[90] In re Canada Southern Ry. Co. (Ontario, 1884) 20 Am. & Eng. R. Cas. 196. And see Pacific Postal Telegraph Cable Co. v. v. Western Union Tel. Co., 50 Fed. 493.

[91] City of St. Louis v. St. Louis Gas Light Co., 70 Mo. 117.

[92] Union Pac. Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co., 10 U. S. App. 98, 51 Fed. 309, af-

As to property which a *quasi* public corporation has not acquired by the exercise of the power of eminent domain, and which is not necessary to enable it to perform its duties to the public, it is in the same position as any other corporation, and may dispose of or incumber the same for any legitimate purpose.[93]

§ 163. Alienation or mortgage of franchises or special privileges.

(a) In general.—It is clear that a corporation cannot, without express authority from the legislature, transfer or mortgage its franchise to be a corporation, for this would result in the creation of a corporation without the consent of the legislature.[94] Nor, according to the better opinion and the weight of authority, both in England and in this country, can a *quasi* public corporation transfer the franchises or special privileges other than the franchise to be a corporation, conferred upon it by its charter, as the franchise or privilege of constructing and maintaining a railroad or canal, or water or gas works, or a turnpike or plank road, or a bank, etc., unless such a transfer is expressly authorized by the legislature or ratified by it.[95] This principle

firming 47 Fed. 15. And see Prospect Park & C. I. R. Co. v. Brooklyn, B. & W. E. R. Co., 84 Hun (N. Y.) 516.

[93] Hendee v. Pinkerton, 14 Allen (Mass.) 381, 1 Keener's Cas. 653, 1 Cum. Cas. 336; Plymouth R. Co. v. Colwell, 39 Pa. St. 337, 1 Smith's Cas. 194; Yates v. Van De Bogert, 56 N. Y. 526.

[94] Ante, § 37.

[95] Shrewsbury & Birmingham R. Co. v. Northwestern R. Co., 6 H. L. Cas. 113; Hinckley v. Gildersleeve, 19 Grant's Ch. (Upper Can.) 212; Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164; Memphis & Little Rock R. Co. v. Railroad Commissioners, 112 U. S. 609; Pennsylvania R. Co. v. St. Louis, Alton & T. H. R. Co., 118 U. S. 290, 630; Oregon R. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1; American Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary (U. S.) 188, 1 Fed. 745, 1 Cum. Cas. 284; Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 2 Am. St. Rep. 124; Snell v. City of Chicago, 133 Ill. 413; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 35 Am. St. Rep. 385; Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Cum. Cas. 331, 1 Keener's Cas. 650, 1 Smith's Cas. 190; Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 400; Stockton v. Central R. Co., 50 N. J. Eq. 52; Abbott v. Johnstown, G. & K. Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Coe v. Columbus, Piqua & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Susquehanna Land Co. v. Bonham, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 313; Pittsburgh & Connellsville R. Co. v. Bedford & Bridgeport R. Co., *81 Pa. St. 104; Ragan v. Aiken, 9 Lea (Tenn.) 609, 42 Am.

not only applies to an absolute conveyance, but it also applies to a lease [96] or mortgage.[97] And it applies to an assignment for the benefit of creditors.[98]

In holding void a lease of its franchises by a corporation created for the purpose of constructing and maintaining a railroad and canal, it was said by Chancellor Zabriskie in a New Jersey case: "This rule is founded on reason and principle. The franchises granted by the state are often parts of the sovereign power delegated to a subject, and always privileges to which other citizens are not entitled. In these grants the state is supposed to regard the character of the grantee, or the guards and restrictions placed upon the corporation, when the grant is by a charter to persons continually changing by transfer of stock. In this case the franchise of maintaining a canal and railroad across public highways and navigable rivers, and of taking tolls and rates of fare fixed by themselves without control, are with others a material part of the property leased; these cannot be leased or aliened without consent of the state."[99]

Another reason why corporations cannot sell their franchises to others is because it would tend to the creation of monopolies. By the exercise of such a power, "a single corporation could easily become possessed of the corporate powers and privileges of all its rivals, and thereby annihilate competition and obtain a complete control of the markets. Such combinations are

Rep. 684; Roper v. McWhorter, 77 Va. 214; Mempnis & Charleston R. Co. v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69.

As to banking corporations, see Fietsam v. Hay, 122 Ill. 293, 3 Am. St. Rep. 492.

[96] Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164; Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 399; Memphis & Charleston R. Co. v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69, and other cases cited in the note preceding.

[97] Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Keener's Cas. 650, 1 Cum. Cas. 333, 1 Smith's Cas. 190; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; and other cases cited in the second note preceding.

The rule does not apply where a corporation purchases its franchises under legislative authority, and mortgages them to secure payment of the purchase price, for the power to give such a mortgage is implied from the power to purchase. Memphis & Little Rock R. Co. v. Dow, 19 Fed. 388.

[98] Fietsan v. Hay, 122 Ill. 293, 3 Am. St. Rep. 492.

[99] Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 399.

usually hurtful, and sound public policy requires that they be kept under legislative supervision and restraint."*

In most jurisdictions this doctrine is too well settled to admit of question, but in some states it has been criticised and even disregarded.[100]

*Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 35 Am. St. Rep. 385, 1 Keener's Cas. 641.

[100] See State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166; Bardstown & Louisville R. Co. v. Metcalf, 4 Metc. (Ky.) 206, 81 Am. Dec. 541; Joy v. Jackson & Michigan Plank Road Co., 11 Mich. 155; City of Detroit v. Mutual Gas Co., 43 Mich. 594; Threadgill v. Pumphrey, 87 Tex. 573, 9 Tex. Civ. App. 184; Enders v. Board of Public Works, 1 Grat. (Va.) 364.

In a late Michigan case it was held that a telephone company having a franchise from a city to use its streets can alienate or mortgage the same without the consent of the city, under a statute authorizing corporations to alienate their property. Michigan Telephone Co. v. City of St. Joseph, 121 Mich. 502. And in a late Kansas case it was held that a corporation organized for the purpose of supplying a city and its inhabitants with water, and given the power generally to mortgage its property, may mortgage the franchise conferred upon it by the city. State v. Topeka Water Co., 61 Kan. 547.

In neither of these cases, however, are any authorities referred to which can be said to support the decision, while numerous decisions directly to the contrary are apparently ignored. The overwhelming weight of authority is to the effect that a corporation created or organized for the purpose of constructing and operating a railroad, turnpike, or tollroad, telegraph or telephone line, water or gas works, or other public enterprise, and which are given the power of eminent domain, and other special franchises or privileges, either by the state or by a municipality under express or implied authority, from the state, in consideration of the benefits to be derived by the public, cannot alienate or mortgage such franchises any more than it can alienate or mortgage its franchise to be a corporation, without legislative authority. Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 1 Keener's Cas. 641, 35 Am. St. Rep. 385; Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 74 Hun, 638, 1 Keener's Cas. 799; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Middlesex R. Co. v. Boston & Chelsea R. Co., 115 Mass. 347; Fanning v. D. M. Osborne & Co., 102 N. Y. 441; State v. Anderson, 90 Wis. 550; Wright v. Milwaukee Electric Railway & Light Co., 95 Wis. 29; State v. Anderson, 97 Wis. 114; Visalia Gas & Electric Light Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105.

And see other cases cited in note 78, supra, and in notes 95-99, supra.

An examination of some of the cases which are cited in support of the power of such corporations to alienate their franchises will show that they were decided under an express grant of such power by the legislature, either in the charter of the particular corporation or a general law. See infra, this section, (b); Louisville Trust Co. v. City of Cincinnati, 47 U. S. App. 36, 76 Fed. 296; Wright v. Milwaukee Electric Railway & Light Co., 95 Wis. 29; New Orleans, Spanish Fort & L. R. Co. v. Delaware, 114 U. S. 501; Threadgill v. Pumphrey, 87 Tex. 573; People v.

(b) Legislative authority to alienate or mortgage franchises, etc.—(1) In general.—Unless prevented by some constitutional limitation, it is within the power of the legislature to expressly authorize a corporation or particular kinds of corporations to transfer, either by absolute sale and conveyance or by lease, or to mortgage, their franchises or special privileges, and part or all of their property, even though they may be *quasi* public corporations, and though the transfer or mortgage may disable them from performing their duties to the public. And in many states such authority has been conferred to a greater or less extent.[101]

——(2) Construction of charter or statutory authority—(aa) In general.—Since a transfer or mortgage by a *quasi* public corporation of its franchises, or of property necessary to enable it to perform the duties which it owes to the public, is contrary to public policy in the absence of express legislative authority, it follows that such power is not to be implied from ambiguous or doubtful language in a charter or statute.[102]

— —(bb) Power to sell and convey absolutely or to lease.—A grant of power to mortgage or pledge does not give the power to sell and convey absolutely.[103] And a grant of power to two

O'Brien, 111 N. Y. 1; Hovelman v. Kansas City Horse R. Co., 79 Mo. 632.

Other cases were cases in which the corporation was not quasi public. See Evans v. Boston Heating Co., 157 Mass. 37.

[101] See Branch v. Jesup, 106 U. S. 468; Snell v. City of Chicago, 133 Ill. 413; East Boston Freight R. Co. v. Eastern R. Co., 13 Allen (Mass.) 422; Lauman v. Lebanon Valley R. Co., 30 Pa. St. 46, 72 Am. Dec. 685; Rafferty v. Central Traction Co., 147 Pa. St. 579, 30 Am. St. Rep. 763; People v. O'Brien, 45 Hun (N. Y.) 519, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 Smith's Cas. 728; State v. Anderson, 97 Wis. 114; Sioux City Terminal R. & W. Co. v. Trust Co. of North America (C. C. A.) 82 Fed. 124.

[102] See Mills v. Central R. Co., 41 N. J. Eq. 1; Archer v. Terre Haute & Indianapolis R. Co., 102 Ill. 493; State v. Chicago, Burlington & K. C. Ry. Co., 89 Mo. 523.

[103] State v. Chicago, Burlington & K. C. Ry. Co., 89 Mo. 523; Southern Pac. Ry. Co. v. Esquibel, 4 N. Mex. (Johns.) 337.

A lease by a railroad company of all its property, without dissolving, is not within a provision, in a general act for the organization of railroad companies, that a corporation organized under it may authorize its own dissolution and the disposition of its property. Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 2.

Nor is a lease or sale of all its property by one railroad company to another necessarily authorized by the use of the words "lessees"

corporations to merge or consolidate their franchises and other property does not give one of them power to lease its franchises and property to the other.[104] But a grant of authority to two railroad companies to contract with each other in any manner not inconsistent with the scope, object, and purpose of their creation and management authorizes one of them to lease its entire property to the other.[105] And when one corporation is authorized to purchase the franchises and property of another, the other is impliedly authorized to sell.[106] A grant of power to a railroad company to sell its property and to incorporate its stock with that of another company gives it the power to sell its property and special privileges to the latter.[107]

— —(cc) **Power to mortgage.**—If a corporation is given the power generally to sell or dispose of its franchises and property, this gives it the power to mortgage the same.[108] And a grant of power to mortgage or pledge gives the power to give a deed of trust as security,[109] and to give a mortgage with a power of sale.[110]

— —(dd) **For what purposes and on what terms.**—When the legislature has conferred upon such a corporation the power to transfer or mortgage its franchises and property for a particular purpose, it cannot do so for any other purpose.[111] And when a statute requires the transfer or mortgage to be made in

or "successors or assigns" in a statute making specific grants to such corporation. Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 2. And see Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164.

[104] Mills v. Central R. Co., 41 N. J. Eq. 1; Archer v. Terre Haute & Indianapolis R. Co., 102 Ill. 493.

[105] St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co., 135 Mo. 173.

[106] New York & N. E. R. Co. v. New York, N. H. & H. R. Co., 52 Conn. 275. Compare State v. Consolidation Coal Co., 46 Md. 1.

[107] Branch v. Jesup, 106 U. S. 468.

[108] McAllister v. Plant, 54 Miss. 106. And see Platt v. Union Pac. R. Co., 99 U. S. 48; Willamette Mfg. Co. v. Bank of British Columbia, 119 U. S. 191; Gordon v. Preston, 1 Watts (Pa.) 388, 26 Am. Dec. 75; Watt's Appeal, 78 Pa. St. 370; East Boston Freight R. Co. v. Eastern R. Co., 13 Allen (Mass.) 422.

[109] Pullman v. Cincinnati & Chicago Air-Line R. Co., 4 Biss. 35, Fed. Cas. No. 11,461.

[110] Joy v. Jackson & Michigan Plank Road Co., 11 Mich. 155; Willink v. Morris Canal & Banking Co., 4 N. J. Eq. 377.

[111] Frazier v. East Tennessee, Virginia & G. R. Co., 88 Tenn. 138.

a particular mode or on certain terms, the requirements of the statute must be complied with.[112]

In determining whether the purpose for which a mortgage is given by a corporation is within the power conferred upon it by its charter, the general object of the grant of power is to be regarded, rather than the strict letter of the charter.[113] Thus, it has been held that a grant to a corporation of power to mortgage its property for the purpose of securing the purchase money and erecting a certain building authorizes a mortgage to secure payment of claims for work done and materials furnished in erecting the building;[114] and that a turnpike company, authorized to borrow money for use in constructing its road, and to mortgage its road to secure payment thereof, may mortgage its road to secure payment of money due to a contractor for construction of the road.[115]

— —(ee) **To whom.**—If a corporation is authorized to sell or lease its franchises or property to a particular person or corporation only, it cannot sell or lease to another person or corporation, and, if authorized to sell or lease to other corporations only, it cannot sell or lease to a person who is about to form a corporation.[116]

— —(ff) **What may be transferred or mortgaged.**—A transfer or mortgage by a *quasi* public corporation under a power conferred by its charter or a statute must be within the power with respect to the property or right transferred or mortgaged. Thus, a railroad company, authorized by its charter to sell or lease its completed road, cannot transfer its right to construct a road.[117]

It has been held that a corporation cannot transfer or mortgage its franchises under a grant of power to transfer or mort-

[112] Snell v. City of Chicago, 133 Ill. 413; Brownell v. Old Colony R. Co., 164 Mass. 29.

[113] Miller v. Chance, 3 Edw. Ch. (N. Y.) 399; Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 1 Keener's Cas. 656, 1 Cum. Cas. 326.

[114] Miller v. Chance, 3 Edw. Ch. (N. Y.) 399.

[115] Greensburgh, M. & H. Turnpike Co. v. McCormick, 45 Ind. 39.

[116] Bird v. Bird's Patent Deodorizing & Utilizing Sewage Co., 9 Ch. App. 358.

[117] Clarke v. Omaha & Southwestern R. Co., 4 Neb. 458; Wood v. Bedford & Bridgeport R. Co., 8 Phila. (Pa.) 94.

gage its *property* merely.[118] As a rule, however, when the power to transfer or mortgage is conferred in broad and general terms, without any express restriction or limitation, it is to be construed as authorizing the transfer or mortgage of the corporation's franchises and special privileges, as well as of its other property,[119] of all its property as well as a part,[120] or, it would seem, though there are decisions to the contrary, of a part of its property as well as all,[121] of both real and personal property,[122] and of future earnings and acquisitions, as well as of property already acquired.[123]

§ 164. Presumption as to validity.

Whenever the circumstances may have been such as to authorize a conveyance, lease, mortgage, or pledge of its property by a corporation, that it was authorized will be presumed, until the contrary is affirmatively shown.[124]

[118] Pullman v. Cincinnati & Chicago Air Line R. Co., 4 Biss. 35, Fed. Cas. No. 11,461; Butler v. Rahm, 46 Md. 541; City of Philadelphia v. Western Union Tel Co., 11 Phila. (Pa.) 327. And see Gloninger v. Pittsburgh & Connellsville R. Co., 139 Pa. St. 13; Randolph v. Wilmington & Reading R. Co., 11 Phila. (Pa.) 502; Joy v. Jackson & Michigan Plank Road Co., 11 Mich. 155.

[119] Thus it has been held that a railroad company is authorized to mortgage its franchises, as well as its other property, under a grant of power to borrow money and secure payment thereof by "such securities in amount and kind" as may be deemed expedient. Pierce v. Milwaukee & St. Paul R. Co., 24 Wis. 551, 1 Am. Rep. 203. See, also, Sioux City Terminal R. & W. Co. v. Trust Co. of North America (C. C. A.) 82 Fed. 124.

[120] Pierce v. Milwaukee & St. Paul R. Co., 24 Wis. 551, 1 Am. Rep. 203; Humphrey v. Threadgill, 9 Tex. Civ. App. 184, 87 Tex. 573.

[121] Joy v. Jackson & Michigan Plank Road Co., 11 Mich. 155. And see Greensburgh, M. & H. Turnpike Co. v. McCormick, 45 Ind. 239; Upson County R. Co. v. Sharman, 37 Ga. 644. Contra, Snell v. City of Chicago, 133 Ill. 413; Tippecanoe County Com'rs v. Lafayette, Muncie & B. R. Co., 50 Ind. 108.

[122] Pierce v. Milwaukee & St. Paul R. Co., 24 Wis. 551, 1 Am. Rep. 203. Contra, under a particular statute relating to mining companies. Roberts' Appeal, 60 Pa. St. 400.

[123] Pierce v. Milwaukee & St. Paul R. Co., 24 Wis. 551, 1 Am. Rep. 203; Philadelphia, Wilmington & B. R. Co. v. Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596; Shaw v. Bill, 95 U. S. 10; Ludlow v. Hurd, 1 Disn. (Ohio) 552; Sioux City Terminal R. & W. Co. v. Trust Co. of North America (C. C. A.) 82 Fed. 124.

[124] McIntire v. Preston, 10 Ill. 48, 48 Am. Dec. 321; Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; Farmers' Loan & Trust Co. v. Curtis, 7 N. Y. 466; Wood v. Wellington, 30 N. Y. 218.

§ 165. Whether the purchasers become a corporation.

The legislature, in authorizing a corporation, like a railroad company, for example, to sell or mortgage its property and franchises, may provide that the grantees or the purchasers at a foreclosure sale under the mortgage shall be a corporation.[125] But in the absence of such a provision, expressed or clearly to be implied, the grantees of the property and special privileges or franchises of a corporation (other than the franchise to be a corporation), or the purchasers thereof under a mortgage, though the conveyance or mortgage may have been authorized by the legislature, do not become a corporation merely by virtue of the conveyance or purchase. In such a case, to become a corporation, they must organize as such under the general corporation laws.[126]

§ 166. Ratification of transfer or mortgage by the legislature.

Since the legislature may expressly authorize a transfer or mortgage of its franchises and property by a corporation, it may ratify a transfer or mortgage made without authority, and thereby render it binding *ab initio*.[127]

Ratification, however, of a transfer or mortgage of its franchises and property by a *quasi* public corporation is not to be inferred from an ambiguous and doubtful language in a statute. Thus, it was held by the supreme court of the United States that an *ultra vires* lease of its franchises and property by one railroad company to another was not ratified and rendered valid by an act of the legislature supplementing the act incorporating the lessor company, and declaring that it should be unlawful "for the di-

[125] See State v. Sherman, 22 Ohio St. 411; Com. v. Central Passenger Ry. Co., 52 Pa. St. 506; Stephenson v. Texas & Pac. Ry. Co., 42 Tex. 163; Acres v. Moyne, 59 Tex. 623.

[126] Snell v. City of Chicago, 133 Ill. 413; Memphis & Little Rock R. Co. v. Railroad Commissioners, 112 U. S. 610; Wellsborough & Tioga Plank Road Co. v. Griffin, 57 Pa. St. 417; Memphis Water Co. v. Magens, 15 Lea (Tenn.) 37.

[127] Chaffee v. Ludeling, 27 La. Ann. 607; Shipley v. Atlantic & St. Lawrence R. Co., 55 Me. 395; Kennebec & Portland R. Co. v. Portland & Kennebec R. Co., 59 Me. 23; Richards v. Merrimack & Connecticut River R. Co., 44 N. H. 127.

rectors, *lessees,* or agents of said railroad" to charge more than a certain rate for carrying passengers or freight. Mr. Justice Miller said: "The mention of the lessees no more implies a ratification of the contract of lease than the word 'directors' would imply a disapproval of the contract. It is not by such an incidental use of the word 'lessees' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the state."[128]

[128] Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164.

CHAPTER X.

POWERS WITH RESPECT TO CONTRACTS.

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§ 167. The general rule.—In the absence of restrictions in its charter or in some other statute, a corporation has the same power as a natural person to enter into contracts, provided they are necessary or reasonably incidental to the business for which it was created; but it has no power to enter into any contract, however beneficial it may be, and even though all the stockholders may consent, which is foreign to the objects for which it was created. Nor can it enter into a contract which is expressly or impliedly prohibited by its charter or by statute, or which is contrary to public policy.

§ 168. Authorized contracts.

The power to contract like an individual need not be expressly conferred upon a corporation by its charter. It is always implied, in the absence of express restrictions, subject to the qualification that the contract must not be foreign to the purposes for which the corporation was created. The general rule is that a corporation, in the absence of express restrictions, has the same power as a natural person to enter into any contract which is necessary to enable it to carry on the business and accomplish the objects for which it was created, or which, though not necessary, in the sense of indispensable, is reasonably incidental to such business.[1] In other words, "in the absence of charter restrictions, the power of a corpora-

[1] London & Northwestern Ry. Co. v. Price, 11 Q. B. Div. 485, 1 Keener's Cas. 493. And see Simpson v. Directors of Westminster Palace Hotel Co., 8 H. L. Cas. 712; Green Bay & Minnesota R. Co. v. Union Steamboat Co., 107 U. S. 98; Alabama Gold Life Ins. Co. v. Central Agric. & Mech. Ass'n, 54 Ala. 77; Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; Perkins v. Portland, Saco & P. R. Co., 47 Me. 573, 74 Am. Dec. 507; Morville v. American Tract Soc., 123 Mass. 137, 25 Am. Rep. 40, 1 Smith's Cas. 588; Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Wiggins Ferry Co. v. Chicago & Alton R. Co., 73 Mo. 389, 39 Am. Rep. 519; Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212; Moss v. Averell, 10 N. Y. 449; Holmes v. Willard, 125 N. Y. 75; Cleveland & Mahoning R. Co. v. Himrod Furnace Co., 37 Ohio St. 321, 41 Am. Rep. 509; Killingsworth v. Portland Trust Co., 18 Or. 351, 17 Am. St. Rep. 737; Hand v. Clearfield Coal Co., 143 Pa. St. 498; Norfolk & Western R. Co. v. Shippers' Compress Co., 83 Va. 272; Attorney General v. Great Eastern Ry. Co., 5 App. Cas. 473; Leslie v. Lorillard, 110 N. Y. 519, 1 Keener's Cas. 465; Colorado Springs Co. v. American Pub. Co. (C. C. A.) 97 Fed. 843.

tion to make contracts is usually measured by the general objects and purposes of the incorporation, and it is always presumed that any proper contract may be made whose scope and tendency are manifestly to further the design and purposes of its creation."[2]

Illustrations.—For example, it has been held that a railroad company may maintain a weighing machine in its yard for the use of customers in weighing coal carried over its road, and make a charge therefor, as this is reasonably incidental to its business as a common carrier of coal.[3] On the same principle, banking corporations, including national banks, owning real estate for use in the transaction of their business, may, for the purpose of securing light and air, make a contract to prevent the erection of buildings on the adjoining land.[4]

A mining corporation, in order to provide for the drainage of its own mine, may contract to advance money to another mining corporation for the construction of a tunnel.[5] And a town-site or land company may contract to pay money or convey lots to induce the location upon its land of a bank, hotel, restaurant, factory, or other business which will enhance the value of its property and aid in its settlement;[6] or, for such a purpose, it may contract to build a college on its land.[7]

A manufacturing or trading corporation, authorized by its charter to manufacture and sell a certain article, may assume a contract made by another corporation or person for the sale

[2] Spangler v. Butterfield, 6 Colo. 356, 364.

"In deciding, therefore, whether a corporation can make a particular contract, it must be considered in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfil the purpose of its existence; or whether the contract is entirely foreign to that purpose." Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 590, 20 Am. Rep. 95.

[3] London & Northwestern Ry. Co. v. Price, 11 Q. B. Div. 485, 1 Keener's Cas. 493.

[4] Trustees of Newark First Presbyterian Church v. National State Bank, 57 N. J. Law, 27.

[5] Sutro Tunnel Co. v. Segregated Belcher Min. Co., 19 Nev. 121.

[6] Sherman Center Town Co. v. Russell, 46 Kan. 382.

[7] Fulton v. Sterling Land & Inv. Co., 47 Kan. 621.

of such article.[8] A smelting company, authorized by its charter to raise and smelt ore, may, on purchasing property necessary to carry on its business, assume a contract made by its vendors for carrying the ore to market.[9] A railroad company, or any other corporation, may properly offer a reward for the detection and conviction of persons committing offenses against its property.[10] And a corporation may adopt any proper means of advertising its business or its enterprise, and make necessary contracts with the publishers of newspapers or others for such purpose.[11]

A railroad company, or other corporation, may lawfully employ a surgeon to attend employes who may be injured in the course of their employment, or otherwise incur expense or liability on such account. And it may establish a voluntary relief department for the purpose of accumulating a fund out of which to pay sums to employes who become sick or disabled.*

As we shall presently see more at length, a corporation, in the absence of express restrictions, and so long as it is acting

[8] Louis Cook Mfg. Co. v. Randall, 62 Iowa, 244.

A corporation for the purpose of carrying on a large department store has the power to enter into a contract with another corporation or person, by which it lets to the latter the right to use space in its store for the sale of a particular article, in consideration of an agreement by the latter to pay it a certain percentage of the receipts, and by which it agrees that no other articles of like character shall be sold in the store. Standard Fashion Co. v. Siegel-Cooper Co., 44 App. Div. (N. Y.) 121.

[9] Moss v. Averell, 10 N. Y. 449.

[10] Central Railroad & Banking Co. v. Cheatham, 85 Ala. 292.

[11] See Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212, where it was held that a corporation created for the purpose of building a bridge could enter into a contract with the publisher of a newspaper to publish statistical articles showing the value of the enterprise as an investment.

A corporation organized under a statute authorizing corporations for the purpose of aiding, encouraging, and inducing immigration, and authorized by its articles of incorporation to buy, hold, and sell lands, town lots, and mineral springs, to improve such property, build hotels and bath houses, etc., has the implied power to make contracts for printed matter, and views of scenery calculated and intended to benefit the corporation by advertising the locality where its lands and springs are located, and to induce immigration. Colorado Springs Co. v. American Publishing Co. (C. C. A.) 97 Fed. 843.

* Bedford Belt Ry. Co. v. McDonald, 17 Ind. App. 492, 60 Am. St. Rep. 172, and cases there collected.

for a legitimate corporate purpose, has the power to borrow money,[12] to become a party to negotiable instruments,[13] to issue bonds,[14] to become guarantor or surety,[15] to enter into contracts jointly with another,[16] to loan money,[17] and to take security.[18]

Arbitration.—A corporation has the power to enter into an agreement to submit matters to arbitration. This power is incidental to the power to contract and to sue and be sued.[19]

Compromise.—A corporation also, as an incident to its power to contract and to sue and be sued, has the power to enter into a compromise.[20] And the compromise is not rendered invalid by the fact that the claim was disputed on the ground that it arose out of an *ultra vires* contract or transaction.[21]

§ 169. Unauthorized contracts.

On the other hand, a corporation has no power to enter into any contract which is foreign to the objects for which it was created.[22] "A corporation and an individual," said the Mis-

[12] Post, § 180.

[13] Post, § 181.

[14] Post, § 183.

[15] Generally, however, such a contract is not authorized. See post, § 184.

[16] Post, § 185(d)(4). Contracts of partnership, however, are generally unauthorized. See post, § 185(b).

[17] Post, § 186.

[18] Post, § 187.

[19] Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83; Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40, 1 Smith's Cas. 588; Brady v. City of Brooklyn, 1 Barb. (N. Y.) 584; Remington Paper Co. v. London Assurance Corp., 12 App. Div. (N. Y.) 218. See post, § 258.

[20] Farmers' Mut. Ins. Co. v. Meese, 49 Neb. 861; Moss v. Averell, 10 N. Y. 449; First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 1 Keener's Cas. 717; Northern Liberty Market Co. v. Kelly, 113 U. S. 199; In re Norwich Provident Ins. Soc., 8 Ch. Div. 334.

[21] Farmers' Mut. Ins. Co. v. Meese, 49 Neb. 861. In this case it was held that a corporation is liable on a note which it issues in compromise of a doubtful claim based upon a policy of insurance issued by it, and for which it received the premium, although it had no power under its charter to accept the risk, and the doubt as to the validity of the claim arose as to that fact.

[22] Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136; East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142; Ashbury Railway Carriage & Iron Co. v. Richie, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557; Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Chewacla Lime Works v. Dismukes, 87 Ala. 344, 1 Keener's Cas. 469; Bates v. Coronado Beach

souri court in an early case, "do not stand upon the same footing in regard to the right of contracting. The latter may make all contracts which in the eye of the law are not inconsistent with the interests of society; whereas, the former, being created for a specific purpose, must look to its charter, which is, as it were, the law of its nature, to ascertain the extent of its capacity. It cannot only make no contracts forbidden by its charter, but it can only make those which are necessary to effectuate the purposes of its creation."[23]

Illustrations.—For example, it has been held that a manufacturing and trading company, authorized by its charter to make and sell particular articles only, cannot lawfully contract to sell other property.[24] An insurance company cannot law-

Co., 109 Cal. 160, 1 Keener's Cas. 683; Lucas v. White Line Transfer Co., 70 Iowa, 541, 59 Am. Rep. 449, 1 Keener's Cas. 460; Bathe v. Decatur County Agricultural Soc., 73 Iowa, 11, 5 Am. St. Rep. 651; Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Keener's Cas. 504, 1 Cum. Cas. 343; Weckler v. First National Bank of Hagerstown, 42 Md. 595, 20 Am. Rep. 95, 2 Cum. Cas. 104; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Keener's Cas. 457, 1 Cum. Cas. 173, 1 Smith's Cas. 564; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Keener's Cas. 762, 1 Cum. Cas. 261; Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Cum. Cas. 148, 1 Smith's Cas. 148; Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 19 Am. St. Rep. 482, 1 Keener's Cas. 819, 1 Smith's Cas. 500; Nassau Bank v. Jones, 95 N. Y. 115, 1 Keener's Cas. 718, 1 Cum. Cas. 293, 1 Smith's Cas. 497; Swift v. Pacific Mail Steamship Co., 106 N. Y. 206, 1 Keener's Cas. 674; Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425, 1 Keener's Cas. 275, 1 Cum. Cas. 393; Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71, 1 Keener's Cas. 794; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Cum. Cas. 245, 1 Smith's Cas. 590.

See, also, New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100; Durkee v. People, 53 Ill. App. 396, 155 Ill. 354; Twiss v. Guaranty Life Ass'n, 87 Iowa, 733, 43 Am. St. Rep. 418; Dresser v. Traders' Nat. Bank, 165 Mass. 120; Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198, 23 Am. Rep. 683; Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Blair v. Perpetual Ins. Co., 10 Mo. 559; People v. Campbell, 144 N. Y. 166; Rock River Bank v. Sherwood, 10 Wis. 230, 78 Am. Dec. 669; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302.

[23] Blair v. Perpetual Ins. Co., 10 Mo. 559, 565, 47 Am. Dec. 129.

[24] See Simmons v. Troy Iron Works, 92 Ala. 427, where it was held ultra vires for a corporation authorized to manufacture, sell, and operate machinery of all kinds, and to carry on such other business as pertains or belongs to machine shops or foundries, to contract to furnish a person with ice. And see ante, § 126(a).

fully insure against risks other than those against which its charter authorizes it to insure.[25] And a boom company, authorized by its charter to boom lumber, cannot contract to drive lumber.[26]

A corporation created for the purpose of manufacturing and leasing railway carriages, etc., cannot lawfully purchase a concession for the construction of a railroad, and contract for the construction and operation of the same.[27] Nor can a corporation created for the purpose of constructing and maintaining a toll road engage in the business of transporting passengers over the road for hire, or contract for the purchase of vehicles for such purpose.[28]

A national bank or savings bank cannot lawfully enter into a contract to receive bonds or other property for safe-keeping.[29] Nor can a national bank contract to turn over to a person a certain amount of fire insurance in consideration of such person's promise to procure it a customer.[30]

A land company cannot lawfully enter into a contract to pay for organizing stock companies to locate upon its land.[31] And it has been held in Georgia that a fire company or a religious corporation (and the same reasoning would apply to other corporations) cannot contract for the use of a steamer to convey its members and their families, or other persons, on an excursion, or engage in selling tickets for such an excursion.[32]

As a general rule, a corporation has no power to enter into

[25] In re Phoenix Life Assurance Co., 2 Johns. & H. 441; Andrews v. Union Mutual Fire Ins. Co., 37 Me. 257; Miller v. American Mutual Accident Ins. Co., 92 Tenn. 167. And see ante, § 126(c). That they may be liable in some jurisdictions if they exceed their powers, see post, § 214(b)(6).

[26] Bangor Boom Corp. v. Whiting, 29 Me. 123.

[27] Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557.

[28] Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Cum. Cas. 148, 1 Smith's Cas. 148.

[29] Weckler v. First Nat Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95, 2 Cum. Cas. 104; Greeley v. Nashua Sav. Bank, 63 N. H. 145.

[30] Dresser v. Traders' Nat Bank, 165 Mass. 120.

[31] It was so held in Schurr v. New York & Brooklyn Suburban Inv. Co., 16 N. Y. Supp. 210, 18 N. Y. Supp. 454, where the corporation was authorized by its charter to purchase, take, hold, pos-

a contract for the purpose of aiding other enterprises; but there may be circumstances under which a donation or subscription in aid of another enterprise would be a legitimate mode of accomplishing its own objects, and in such a case the contract is authorized. This question has been considered in treating of the power of corporations to transfer their property.[33]

§ 170. Benefit to corporation.

The fact that a particular contract will be beneficial to a corporation, and increase its business and profits, is entitled to consideration in determining whether the contract is necessary or proper in the conduct of its business;[34] but this fact does not render *intra vires* a contract which is clearly foreign to the objects of its creation.[35] Thus, the fact that its business and profits will be increased does not give a corporation created for the purpose of manufacturing and leasing railroad carriages, etc., the power to purchase a concession for the construction of a railroad and to contract for constructing and operating the same;[36] or give a corporation created for the purpose of constructing and maintaining a turnpike or road, and taking tolls for travel thereon, power to run vehicles over its road for the carriage of passengers or freight, or to contract for the purchase of vehicles for such purpose.[37]

sess, sell, improve, and lease real estate and buildings, and manufacture, lease, sell, and use building stone, lumber, and other building materials.

[32] Screven Hose Co. v. Philpot, 53 Ga. 625; Hariman v. First Bryan Baptist Church, 63 Ga. 186.

[33] See ante, § 159(f).

[34] See Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234; Sherman Center Town Co. v. Russell, 46 Kan. 382.

[35] Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 162. 1 Smith's Cas. 557; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Keener's Cas. 457, 1 Cum. Cas. 173, 1 Smith's Cas. 564; Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Cum. Cas. 148, 1 Smith's Cas. 148; Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146. And see Dresser v. Traders' Nat. Bank, 165 Mass. 120; People v. Campbell, 144 N. Y. 166; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26.

[36] Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557.

[37] Downing v. Mt. Washington

§ 171. Consent or ratification by stockholders.

Nor does the fact that all the stockholders of a corporation consent to a contract which is foreign to the objects of the corporation make it any the less *ultra vires,* for the powers of a corporation depend, not upon the consent of its stockholders, but upon the powers granted by the state.[38] And it follows that an *ultra vires* contract by a corporation does not become binding because of ratification by all the stockholders.[39]

§ 172. Usage and custom.

The fact that it has been the custom of a corporation to enter into transactions which are not authorized by its charter cannot render such transactions any the less *ultra vires.* "The usage of a corporation does not become the law of its existence, or the measure of its powers. The general law of the state, (speaking of a corporation organized under a general law,) of which all persons are presumed to have knowledge, is the source and limit of all its powers and duties; and these cannot be varied either by usage or contract."[40]

§ 173. Contracts in anticipation of authority.

A contract by a corporation need not necessarily have been authorized at the time it was made. A corporation may enter into a contract in anticipation of authority from the legislature, with the condition that such authority shall be obtained, and when it is obtained the contract will be binding. Thus, a railroad company, with a view to altering one of the branches of its road, may enter into a contract for the purchase of land condi-

Road Co., 40 N. H. 230, 1 Cum. Cas. 148, 1 Smith's Cas. 148.

[38] Ante, § 125.

[39] Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cum. Cas. 152, 1 Smith's Cas. 557, reversing L. R. 9 Exch. 224, 2 Cum. Cas. 34; Louisville, New Albany & C. R. Co. v. Louisville Trust Co., 174 U. S. 552. And see ante, § 125.

[40] Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425, 1 Keener's Cas. 689, 1 Cum. Cas. 393.

tioned upon its obtaining legislative authority to make the change and purchase the land.[41]

§ 174. Presumption of validity.

In accordance with the maxim, *Omnia acta rite esse praesumuntur,* a contract entered into by a corporation will be presumed to be within the powers conferred upon it by its charter unless the contrary appears, the burden of proof being upon one who attacks the contract as *ultra vires.*[42]

§ 175. Contracts prohibited by law.

In a broad sense, every contract by a corporation which is not within the powers conferred upon it by its charter is in violation of law and contrary to public policy, but these expressions are generally used in a narrower sense. A contract by a corporation may be illegal for other reasons than because it is not authorized by its charter. A corporation is on substantially the same footing as a natural person with respect to agreements which are unlawful because of their being in violation of positive law or contrary to public policy. Unless expressly authorized by its charter, it can enter into no agreement which would be void on these grounds if entered into by an individual.[43]

Thus, a corporation is within a statute prohibiting any person from exercising banking privileges without authority from the legislature, and a contract entered into by a corporation in the course of a banking business without such authority is void.[44] The same is true of contracts in violation of the Sun-

[41] Scottish Northeastern Ry. Co. v. Stewart, 3 Macq. H. L. Cas. 382. See, also, Taylor v. Chichester & Midhurst Ry. Co., L. R. 4 H. L. 628; New Haven & Northampton R. Co. v. Hayden, 107 Mass. 525; Portage County Sup'rs v. Wisconsin Cent. R. Co., 121 Mass. 460; Sussex R. Co. v. Morris & Essex R. Co., 19 N. J. Eq. 13.

[42] Scottish Northeastern Ry. Co. v. Stewart, 3 Macq. H. L. Cas. 382; Shrewsbury & Birmingham Ry. Co. v. Northwestern Ry. Co., 6 H. L. Cas. 125; Ohio & Mississippi Ry. Co. v. McCarthy, 96 U. S. 267; Ellerman v. Chicago Junction Railways & Union Stockyards Co., 49 N. J. Eq. 217; Howard v. Boorman, 17 Wis. 459; International Building & Loan Ass'n, No. 2, v. Wall, 153 Ind. 554; West v. Averill Grocery Co., 109 Iowa, 488; ante, § 128(c)(3).

[43] See ante, § 24.

[44] People v. Utica Ins. Co., 15

day laws,[45] or of the statutes against usury,[46] etc. Whether or not a corporation can be held liable upon, or enforce, a contract prohibited by law, is considered more at length in another chapter.[47]

§ 176. Contracts contrary to public policy.

What has been said in the preceding section is equally true of contracts which are contrary to public policy. A corporation is just as much subject as an individual to the rule which forbids and renders void a lobbying contract, or contract contemplating the use of improper means to influence or prevent legislation;[48] or an unlawful agreement to withdraw opposition to the passage of a bill pending before the legislature;[49] or a contract contemplating the use of improper means to procure a contract from public officers;[50] or an agreement contemplating the commission of a fraud upon another corporation or person, or a breach of trust by an officer or agent of a corporation or other person.[51]

Johns. (N. Y.) 358, 8 Am. Dec. 243.

Discounting bills and notes as a regular business is within a prohibition against banking. New York Firemen Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664; New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100.

[45] Handy v. St. Paul Globe Pub. Co., 41 Minn. 188, 16 Am. St. Rep. 695.

[46] Commercial Bank of Manchester v. Nolan, 7 How. (Miss.) 508.

[47] See post, § 222 et seq.

[48] Chippewa Valley & S. Ry. Co. v. Chicago, St. P., M. & O. Ry. Co., 75 Wis. 224; Marshall v. Baltimore & Ohio R. Co., 16 How. (U. S.) 314; Pingry v. Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; Reed v. Peper Tobacco Warehouse Co., 2 Mo. App. 82.

[49] Scottish Northeastern Ry. Co. v. Stewart, 3 Macq. H. L. Cas. 382.

A corporation cannot grant privileges to individuals in consideration of their withdrawal of opposition, on public grounds, to the passage of an act affecting the interests of the corporation. Pingry v. Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676. This does not apply, however, where the opposition is of a private character, and for the protection of purely private interests, and there is no design to conceal the arrangement from the legislature. Low v. Connecticut & Passumpsic Rivers R. Co., 46 N. H. 284.

A contract by a corporation collecting lawful fees due public officers, by which it is to retain a portion of such fees in consideration of forbearance to take steps to procure the repeal of the law by which the offices were created, is illegal on grounds of public policy. Reed v. Peper Tobacco Warehouse Co., 2 Mo. App. 82.

[50] Providence Tool Co. v. Norris, 2 Wall. (U. S.) 45.

[51] Thus a contract is illegal and void where its object is to influence directors of a corporation to act for the benefit of others,

A corporation is also within the rule prohibiting a contract in unreasonable restraint of trade or tending to create a monopoly and prevent competition.[52] What are known as "trust" agreements between corporations for the purpose of stifling competition and creating a monopoly are illegal, and not merely *ultra vires*. A corporation created for the purpose of distilling and selling whisky cannot buy up all the distilleries in the state, and thus acquire a monopoly in the business, for such a transaction is not only beyond the powers conferred upon it by its charter, but is contrary to public policy and void because it is in restraint of trade, and prevents competition.[53] The same is

and to the prejudice of the corporation. Bliss v. Matteson, 52 Barb. (N. Y.) 335.

[52] Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200; Oliver v. Gilmore, 52 Fed. 562; State v. Nebraska Distilling Co., 29 Neb. 700; Manchester & Lawrence R. Co. v. Concord R. Co., 66 N. H. 100; Emery v. Ohio Candle Co., 47 Ohio St. 320, 21 Am. St. Rep. 819; Nester v. Continental Brewing Co., 161 Pa. St. 473, 41 Am. St. Rep. 894; Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, and note, pp. 235-273.

A contract in restraint of trade is not rendered lawful by the fact that the articles affected by it are not necessaries of life. It has been held, therefore, that a pool or combination among corporations to control the price of beer in a city or county is unlawful. Nester v. Continental Brewing Co., 161 Pa. St. 473, 41 Am. St. Rep. 894. See, also, Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200.

A charter authorizing a corporation to engage in a general distilling business, and to own property necessary for that purpose, does not authorize it to form a trust or combination, and thus create a monopoly of such business. Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200.

Contracts of corporations, like contracts of individuals, are not illegal because of their being in restraint of trade, if the restraint is reasonable under the circumstances. Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464.

In a New York case it was held that a contract by a steamship company to pay a certain sum of money monthly to the owner of a competing line in consideration of his discontinuing running his vessels over that route, and agreeing not to sell or charter his vessels for use thereon, nor to be in any way connected with or interested in steamships running over it, was neither ultra vires nor contrary to public policy, as being in unreasonable restraint of trade. Leslie v. Lorillard, 110 N. Y. 519, 1 Keener's Cas. 465.

For a valuable and extensive note on the subject of corporate contracts in restraint of trade, and upon lawful and unlawful "trust" agreements and combinations, see the note to Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, pp. 235-273.

[53] Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200. See the preceding note,

true of a contract between railroad companies for the purpose of preventing fair competition and creating a monopoly.[54]

The question as to whether any rights and liabilities can arise out of contracts with corporations which are contrary to public policy is elsewhere considered.[55]

§ 177. Contracts by quasi public corporations.

A *quasi* public corporation, as a railroad or canal company, or waterworks or gaslight company, which is given the power of eminent domain or other special privileges in return for the benefit which is to accrue to the public, and which for this reason owes special duties to the public, cannot enter into any contract, not expressly authorized by its charter, which will render it wholly or partially unable to perform such duties. Aside from any question as to whether such a contract is foreign to the business for which the corporation was created, it is void as being contrary to public policy, and therefore illegal.

"The principle is," said Mr. Justice Miller in the supreme court of the United States, "that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."[56]

and the cases and references therein.

[54] State v. Hartford & New Haven R. Co., 29 Conn. 538. And see the cases cited in the notes following.

[55] See post, § 224.

[56] Thomas v. West Jersey R. Co., 101 U. S. 71, 83, 1 Cum. Cas. 164, 170. And see Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44; Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Keener's Cas. 650, 1 Cum. Cas. 331, 1 Smith's Cas. 190; Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396; Peoria & Rock Island Ry. Co. v. Coal Valley Min. Co., 68 Ill. 489; Archer v. Terre Haute & Indianapolis R. Co., 102 Ill. 493; Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 2 Am. St.

For example, a railroad company cannot, without express authority, lease its road to another company for a term of years.[57] A street-railroad company cannot enter into a contract with the owner of property on the street, by which, in consideration of his consent to its laying a track in the street, it binds itself not to lay an additional track in the future, if an additional track may be necessary to enable it to properly serve the public.[58] And a gas company created for the purpose of supplying a city and its inhabitants with gas, and vested with the power of eminent domain, cannot make a contract with another company transferring its right to furnish gas in a particular part of the city, and disabling itself to this extent from performing its duties to the public.[59]

§ 178. Contracts prohibited by charter.

A corporation cannot enter into any contract which is expressly prohibited by its charter. Such a contract is not only *ultra vires* as in excess of the powers conferred upon the corporation by its charter, but it is illegal because it is in violation of an express statutory prohibition.[60]

§ 179. Limitation of indebtedness.

When the charter of a corporation limits the amount of in-

Rep. 124; Ayr Harbor Trustees v. Oswald, 8 App. Cas. 623; Pueblo & Arkansas Valley R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512; Abbott v. Johnston, G. & K. Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; Sapp v. Northern Cent. Ry. Co., 51 Md. 126; State v. Consolidation Coal Co., 46 Md. 1; Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 70 Am. Dec. 479; City of St. Louis v. St. Louis Gaslight Co., 70 Mo. 69; Roper v. McWhorter, 77 Va. 214; West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Great Northern Ry. Co. v. Eastern Counties Ry. Co., 9 Hare, 306.

[57] Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44; ante, § 162.

[58] Doane v. Chicago City Ry Co., 51 Ill. App. 353.

[59] Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 2 Am. St. Rep. 124.

[60] Rendall v. Crystal Palace Co., 4 Kay & J. 326; Canton Masonic Mut. Benev. Soc. v. Rockhold, 26 Ill. App. 141, 129 Ill. 440; Plummer v. Penobscot Lumbering Ass'n, 67 Me. 363.

debtedness which it may incur, it prohibits and renders *ultra vires* a contract which will increase its indebtedness beyond the limit,[61] unless the provision, as is sometimes the case, may be regarded as merely directory to the officers of the corporation, and not as affecting the powers of the corporation itself.[62] Thus, corporations are often prohibited from incurring indebtedness beyond the amount of their capital stock or beyond a certain proportion of their capital stock.[63] We shall see, when we come to treat of the effect of *ultra vires* contracts, that some courts treat a contract as absolutely void when it increases the indebtedness of the corporation beyond the limit fixed by its charter, while others do not.[64]

Debts to which the prohibition applies.—It has been held that a limitation of the amount of indebtedness which a corporation may incur does not apply to indebtedness arising out of implied contract, as an indebtedness implied from the receipt of money which ought to be repaid,[65] or to debts necessarily contracted by the corporation in the conduct of its ordinary business, as for rent, for the services of clerks and servants, for the purchase of

[61] In re Pooley Hall Colliery Co., 21 Law T. (N. S.) 690; English Channel Steamship Co. v. Rolt, 17 Ch. Div. 715; Com. v. Lehigh Ave. Ry. Co., 129 Pa. St. 405; Covington First Nat. Bank v. D. Kiefer Milling Co., 95 Ky. 97; post, § 180(e).

[62] Thus, where a statute merely makes the directors of a corporation personally liable for debts contracted in excess of the capital stock, a contract increasing the indebtedness beyond such limit is not ultra vires with respect to the corporation. Sells v. Rosedale Grocery & Commission Co., 72 Miss. 590. And see Sherman Center Town Co. v. Morris, 43 Kan. 282, 19 Am. St. Rep. 134; Ossipee Hosiery & Woolen Mfg. Co. v. Canney, 54 N. H. 295.

[63] It was held in Pennsylvania that a statute limiting the amount of indebtedness which a corporation might incur to the par value of its "capital stock" meant, not authorized capital stock, but capital stock actually paid up. Com. v. Lehigh Ave. Ry. Co., 129 Pa. St. 405. But see English Channel Steamship Co. v. Rolt, 17 Ch. Div. 715.

That stock issued in payment of dividends is to be considered in determining whether a debt contracted by the corporation is in violation of a statute prohibiting it from contracting debts in excess of one-half of the amount of its "paid-up capital stock," see Cunningham v. German Ins. Bank (C. C. A.) 101 Fed. 977.

[64] Post, § 225(f).

[65] Weber v. Spokane Nat. Bank, 29 U. S. App. 97, 64 Fed. 208; Humphrey v. Patrons' Mercantile Ass'n, 50 Iowa, 607.

It is otherwise in the case of municipal corporations. Litchfield v. Ballou, 114 U. S. 190.

materials by a manufacturing company, etc.[66] A limitation of the amount of a particular kind of indebtedness does not apply to other kinds of indebtedness.[67] And, of course, the limitation does not apply to debts expressly excepted.[68]

Mere change in the form of indebtedness.—A prohibition against an increase of the indebtedness of a corporation is not violated by a mere change in the form of an existing debt, as by giving a mortgage or bond and mortgage to secure a pre-existing debt,[69] or by borrowing money to pay off an existing debt, and actually using it for such purpose.[70]

§ 180. Power to borrow money—(a) In general.—In the absence of express restrictions, a corporation has the implied power to borrow money for legitimate corporate purposes, but it cannot borrow money for a purpose not authorized by its charter, or in violation of an express or implied charter or statutory prohibition.

Frequently the power to borrow money is expressly conferred

[66] Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110.

The liability of a bank implied from the receipt of deposits is not within a limitation of indebtedness. Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110; Ahl v. Rhoads, 84 Pa. St. 319.

[67] A limitation of the "bonded indebtedness" of a corporation does not apply to nonnegotiable notes secured by a mortgage. Underhill v. Santa Barbara Land Bldg. & Imp. Co., 93 Cal. 300.

[68] A mortgage by a corporation of its own real estate to secure a debt is within a provision that a limitation of indebtedness shall not apply to debts secured "by an actual transfer of real estate securities." Montpelier First Nat. Bank v. Sioux City Terminal Railroad & Warehouse Co., 69 Fed. 441.

Under the national bank act, which prohibits a national bank from contracting liabilities in excess of its paid-up capital stock, except upon notes of circulation, moneys deposited with it or collected by it, bills of exchange or drafts drawn against money actually on deposit to its credit, and liabilities to stockholders for dividends and reserved profits, the items thus excepted are to be excluded in determining the indebtedness of a national bank at the time of its contracting a debt. Weber v. Spokane Nat. Bank, 29 U. S. App. 97, 64 Fed. 208, reversing 50 Fed. 735.

[69] Powell v. Blair, 133 Pa. St. 550; Ahl v. Rhoads, 84 Pa. St. 319; King County Land & Live Stock Co. v. Thomson, 21 Tex. Civ. App. 473.

[70] Humphrey v. Patrons' Mercantile Ass'n, 50 Iowa, 607.

A mortgage loan obtained by a corporation does not increase its indebtedness, within the meaning of a prohibition against an increase of indebtedness without the consent of a majority of the stockholders, where the money borrowed is applied in payment of a purchase money indebtedness of the company on the property mortgaged. Powell v. Blair, 133 Pa. St. 550.

upon a corporation by its charter, but it need not necessarily be so. The power to contract includes the power to borrow money for legitimate corporate purposes, and therefore it is well settled that a corporation, in the absence of restrictions in its charter or in some other statute, has the same power to borrow money as an individual has, implied when not expressly granted, whenever such a transaction is necessary or proper in the conduct of the business for which it was created.[71]

This is true of all corporations, including railroad companies,[72] steamboat companies,[73] turnpike companies,[74] warehouse and storage companies authorized to advance money on merchandise,[75] insurance companies,[76] banking companies, including national banks and savings banks,[77] mining companies,[78]

[71] In re Patent File Co., 6 Ch. App. 83, 1 Keener's Cas. 659, 1 Cum. Cas. 322; Bradbury v. Boston Canoe Club, 153 Mass. 77, 1 Smith's Cas. 196, 1 Keener's Cas. 507; National Park Bank of New York v. German-American Mutual Warehousing & Security Co., 53 N. Y. Super. Ct. 367, 116 N. Y. 281, 1 Keener's Cas. 513; Union Bank of Knoxville v. Jacobs, 6 Humph. (Tenn.) 515, 1 Smith's Cas. 200, 1 Cum. Cas. 302.

And see In re International Life Assurance Soc., L. R. 10 Eq. 312; Mahoney Min. Co. v. Anglo-California Bank, 104 U. S. 192; Alabama Gold Life Ins. Co. v. Central Agric. & Mech. Ass'n, 54 Ala. 73; Ward v. Johnson, 95 Ill. 215; Smith v. Law, 21 N. Y. 296; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; Morville v. American Tract Soc., 123 Mass. 126, 25 Am. Rep. 40; Commissioners of Craven v. Atlantic & North Carolina R Co., 77 N. C. 292; Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Lucas v. Pitney, 27 N. J. Law, 221; and other cases more specifically cited in the notes following.

[72] Royal British Bank v. Turquand, 5 El. & Bl. 248; Lucas v. Pitney, 27 N. J. Law, 221; Gloninger v. Pittsburgh & Connellsville R. Co., 139 Pa. St. 13; Union Bank of Knoxville v. Jacobs, 6 Humph. (Tenn.) 515, 1 Smith's Cas. 200, 1 Cum. Cas. 302; Savannah & Memphis R. Co. v. Lancaster, 62 Ala. 555.

[73] Australian Auxiliary Steam Clipper Co. v. Mounsey, 4 Kay & J. 733; Booth v. Robinson, 55 Md. 419.

[74] Smith v. Law, 21 N. Y. 296.

[75] National Park Bank of New York v. German-American Mutual Warehouse & Security Co., 53 N. Y. Super. Ct. 367, 116 N. Y. 281, 1 Keener's Cas. 513.

[76] In re International Life Assurance Soc., L. R. 10 Eq. 312; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; Nelson v. Eaton, 26 N. Y. 410; Orr v. Mercer County Mutual Fire Ins. Co., 114 Pa. St. 387.

The case of Bacon v. Mississippi Ins. Co., 31 Miss. 116, to the contrary cannot be sustained.

[77] Maclae v. Sutherland, 3 El. & Bl. 1; Ward v. Johnson, 95 Ill. 215; Heironimus v. Sweeney, 83 Md. 146; Donnell v. Lewis County Sav. Bank, 80 Mo. 165; Fifth Ward Sav. Bank of Jersey City v. Jersey City First Nat. Bank, 48 N. J. Law, 513.

[78] Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248;

manufacturing and trading companies,[79] gas and water companies,[80] agricultural and mechanical associations and societies,[81] corporations for encouraging athletics and sports,[82] building and loan associations,[83] colleges, academies, and other educational corporations,[84] religious corporations,[85] etc.

It may be laid down as a general rule that whenever the charter of a corporation gives it the power, expressly or impliedly, to purchase property or otherwise incur a debt, it has the implied power, in the absence of restrictions in its charter, to borrow money to pay for the property or to pay the debt. It was said in an Alabama case: "Having the power to acquire and hold personal and real estate, by purchase, it has, as an incident, the power to borrow money to make the purchase. The exercise of such power may be advantageous and useful, enabling the corporation the sooner to put its powers into active exercise, and to acquire the necessary property on terms more profitable to its stockholders. It would scarcely be affirmed that the power to acquire and hold real and personal estate, must be so narrowed that the corporation could not contract a debt for its purchase—that at the very moment of the purchase and conveyance, the purchase money must be counted out, or the purchase

Larwell v. Hanover Savings Fund Soc., 40 Ohio St. 282. But see Burmester v. Norris, 6 Exch. 796; Tredwen v. Bourne, 6 Mees. & W. 465.

[79] In re Hamilton's Windsor Iron Works, 12 Ch. Div. 707; National Shoe & Leather Bank's Appeal, 55 Conn. 469; Beers v. Phoenix Glass Co., 14 Barb. (N. Y.) 358; Commercial Bank of New Orleans v. Newport Mfg. Co., 1 B. Mon. (Ky.) 14, 35 Am. Dec. 171; Oxford Iron Co. v. Spradley, 46 Ala. 98; Smith v. Eureka Flour Mills Co., 6 Cal. 1; Burr's Ex'rs v. McDonald, 3 Grat. (Va.) 216.

[80] Wood v. Whelen, 93 Ill. 153; Hays v. Gallon Gas Light & Coal Co., 29 Ohio St. 330; Partridge v. Badger, 25 Barb. (N. Y.) 146.

[81] Alabama Gold Life Ins. Co. v. Central Agric. & Mech. Ass'n, 54 Ala. 73; Taylor v. Agricultural & Mechanical Ass'n, 68 Ala. 229; Thompson v. Lambert, 44 Iowa, 239.

[82] Bradbury v. Boston Canoe Club, 153 Mass. 77, 1 Smith's Cas. 196, 1 Keener's Cas. 507.

[83] North Hudson Mutual Building & Loan Ass'n v. Hudson First Nat. Bank, 79 Wis. 31; Davis v. West Saratoga Building Union, 32 Md. 285. And see Murray v. Scott, 9 App. Cas. 519. But see In re National Permanent Ben. Bldg. Soc., 5 Ch. App. 309, 1 Keener's Cas. 807, 1 Cum. Cas. 274; State v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258, 1 Cum. Cas. 566.

[84] Moss v. Harpeth Academy, 7 Heisk. (Tenn.) 283.

[85] Davis v. Proprietors of Lowell Second Universalist Meeting House, 8 Metc. (Mass.) 321.

and conveyance is void. If the necessities and interests of the corporation require it, which must be determined by those having charge of its affairs, and intrusted with the power and duty, that a debt be contracted in the acquisition of the necessary property, the power to contract it cannot be denied. If more advantageous to borrow the money, and make immediate payment, than to contract the debt for the purchase money with the vendor, the contract is equally within the scope of corporate power, and valid. The authorities, we think, support the proposition that every private corporation, unless prohibited, may borrow money to carry out the purposes of its creation."[86]

(b) What is included in this power.—Authority to raise money by borrowing, whether such authority is expressly conferred or implied, does not give the power to use means to raise money which do not fall within the definition of a borrowing. The power to borrow, therefore, cannot be relied upon to sustain the issue by a corporation of irredeemable bonds entitling the holder merely to a share in the earnings of the corporation;[87] or to sustain the issue of preferred stock.[88] A corporation authorized to borrow money for the purposes of its business is not authorized to receive money on deposit.[89]

The power to borrow includes the power to borrow the credit

[86] Per Brickell, C. J., in Alabama Gold Life Ins. Co. v. Central Agric. & Mech. Ass'n, 54 Ala. 73, 77.

"The weight of modern authority supports the conclusion that private corporations, organized for pecuniary profit, may, like individuals, borrow money whenever the nature of their business renders it proper or expedient that they should do so, subject only to such express limitations as are imposed by their charters. The power to borrow carries with it, by implication, unless restrained by the charter, the power to secure the loan by mortgage. Accordingly it may be regarded as settled that where general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessions; it may borrow money to attain its legitimate objects, precisely as an individual, and bind itself by any form of obligation not forbidden." Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412.

[87] Taylor v. Philadelphia & Reading R. Co., 7 Fed. 386; McCalmont v. Philadelphia & Reading R. Co., 10 Wkly. Notes Cas. (Pa.) 338. But see Philadelphia & Reading R. Co. v. Stichter, 11 Wkly. Notes Cas. (Pa.) 325.

[88] Kent v. Quicksilver Min. Co., 78 N. Y. 159.

[89] Chapman v. Lynch, 156 N. Y. 551, 1 Keener's Cas. 768.

of others and employ it in raising money, as by borrowing the notes of others and raising money thereon by indorsing and discounting or pledging them.[90]

(c) When the power to borrow is not implied.—Power on the part of a corporation to borrow money will not be implied when its nature and the objects for which it was created are such that borrowing money cannot be a necessary or proper means of carrying on its business,[91] or where its charter provides a particular fund to be exclusively used in accomplishing its objects.[92]

And in no case has a corporation of any kind the power to borrow money for a purpose which is foreign to the objects for which it was created. As was said in a New York case, the power of a corporation to borrow money is not a principal power, but an incidental power.[93] For example, a corporation has no power to borrow money in order to make an *ultra vires* purchase of property.[94] A bank may borrow money to use in discounting notes, but it cannot borrow money for use in speculations outside of the business of banking.[95] An insurance company may borrow money to pay losses or expenses, but it

[90] Lucas v. Pitney, 27 N. J. Law, 221; Taylor v. Agricultural & Mechanical Ass'n, 68 Ala. 229; Holbrook v. Basset, 5 Bosw. (N. Y.) 147; Furniss v. Gilchrist, 1 Sandf. (N. Y.) 53.

[91] In re National Permanent Ben. Bldg. Soc., 5 Ch. App. 309, 1 Keener's Cas. 807, 1 Cum. Cas. 274, 1 Smith's Cas. 582; In re Cork & Youghal Ry. Co., 4 Ch. App. 748, 1 Cum. Cas. 265; Wenlock v. River Dee Co., 10 App. Cas. 354; Wenlock v. River Dee Co., 19 Q. B. Div. 155, 1 Cum. Cas. 277, 1 Smith's Cas. 577; State v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258, 1 Cum. Cas. 566; Ruitz v. Sandwich Roman Catholic Episcopal Corp., 30 Upper Can. Q. B. 269; Trenton Mutual Life & Fire Ins. Co. v. McKelway, 12 N. J. 133; Pittsburgh & Connellsville R. Co. v. Allegheny County, 63 Pa. St. 126.

[92] Trenton Mutual Life & Fire Ins. Co. v. McKelway, 12 N. J. Eq. 133; Lewis & Mason County Turnpike Road Co. v. Thomas (Ky. 1887) 3 S. W. 907; State v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258, 1 Cum. Cas. 566; In re National Permanent Ben. Bldg. Soc., 5 Ch. App. 309, 1 Keener's Cas. 807, 1 Cum. Cas. 274, 1 Smith's Cas. 582.

[93] Beers v. Phoenix Glass Co., 14 Barb. (N. Y.) 358, 362. See, also, Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656, 1 Cum. Cas. 249.

[94] Leavitt v. Yates, 4 Edw. Ch. (N. Y.) 134; Adams & Westlake Co. v. Deyette, 8 S. D. 119; In re London, Hamburg & Continental Exch. Bank, 5 Ch. App. 444.

[95] Leavitt v. Yates, 4 Edw. Ch. (N. Y.) 134.

cannot borrow in order to provide a fund for the purpose of giving it credit.[96] A building and loan association may borrow money to pay debts lawfully incurred, but not for the purpose of making loans or speculating.[97]

(d) Prohibition against borrowing.—Of course, a corporation has no power to borrow money in violation of a prohibition in its charter.[98] A prohibition against borrowing, however, does not prevent it from obtaining money by other means, as by selling its property in good faith, and leasing or hiring the same from the purchaser, under a contract giving it the right to repurchase.[99] Nor does a prohibition against borrowing prevent it from continuing its business and incurring debts in the usual course thereof, as for labor, supplies, etc.[100]

The fact that the charter of a corporation authorizes it to raise money in a certain way does not exclude its general power to borrow money, when necessary, unless it appears that such was the intention of the legislature. Thus, it was held that the fact that the charter of a corporation created for the purpose of encouraging athletic sports authorized it to receive and hold in trust funds given or bequeathed to it did not confine it to that mode of raising money for the purpose of purchasing or leasing land and erecting buildings as authorized by its charter, but that it had the general power to borrow money for such a purpose.[101] And where the charter of a railroad company authorized it to borrow such money as might be necessary to construct and equip its road, and secure the same by mortgage, it

[96] Trenton Mutual Life & Fire Ins. Co. v. McKelway, 12 N. J. Eq. 133.

[97] In re National Permanent Ben. Bldg. Soc., 5 Ch. App. 309, 1 Keener's Cas. 807, 1 Cum. Cas. 274, 1 Smith's Cas. 582; State v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258, 1 Cum. Cas. 566.

[98] Wenlock v. River Dee Co., 19 Q. B. Div. 155, 1 Cum. Cas. 277, 1 Smith's Cas. 577; Wenlock v. River Dee Co., 10 App. Cas. 354; Com. v. Lehigh Ave. Ry. Co., 129 Pa. St. 405; Wallis v. Johnson School Tp., 75 Ind. 368; and cases hereafter cited.

[99] Yorkshire Railway Wagon Co. v. Maclure, 21 Ch. Div. 309.

[100] In re German Min. Co., 4 De Gex, M. & G. 19. And see Hawtayne v. Bourne, 7 Mees. & W. 595; Hawkers v. Bourne, 8 Mees. & W. 703.

[101] Bradbury v. Boston Canoe Club, 153 Mass. 77, 1 Smith's Cas. 196, 1 Keener's Cas. 507.

was held that this did not take away its general power to borrow money for use in the course of its business.[102]

(e) Limitation as to amount.—If the charter of a corporation allows it to borrow money, but prohibits it from borrowing more than a certain amount, it has no power to exceed the limit; and when a charter gives the corporation power to borrow a certain sum, or not exceeding a certain sum, it impliedly prohibits it from borrowing in excess of such sum under any general power to borrow which it might otherwise have.[103]

§ 181. Power to become a party to negotiable instruments—(a) In general.—In the absence of express restrictions, a corporation has the power to make, draw, accept, or indorse negotiable instruments, and to assume the liabilities arising out of such a contract, provided it does so for a legitimate corporate purpose, but it cannot lawfully become a party to such an instrument for a purpose which is not authorized by its charter.

As a general rule, it has no power to become a party to a bill or note for the mere accommodation of another.

In all jurisdictions a corporation has the same power as a natural person to bind itself by becoming a party to a negotiable instrument, either as maker, drawer, acceptor, or indorser, and to assume all the liabilities imposed by such a contract, if it is expressly or impliedly authorized by its charter to do so, but the courts in England and in this country do not agree as to when such authority will be implied.

In England and in Canada the power to make or indorse negotiable promissory notes, and to draw, accept, or indorse negotiable bills of exchange, is implied in the case of a corporation created primarily for the purpose of trading.[104] And a

[102] Lucas v. Pitney, 27 N. J. Law, 221.

[103] Gordon v. Sea Fire Life Assurance Soc., 1 Hurl. & N. 599; In re Cork & Youghal Ry. Co., 4 Ch. App. 748, 1 Cum. Cas. 265; Wenlock v. River Dee Co., 19 Q. B. Div. 155, 1 Cum. Cas. 277, 1 Smith's Cas. 577; Wenlock v. River Dee Co., 10 App. Cas. 354; Covington First Nat. Bank v. D. Kiefer Milling Co., 95 Ky. 97; Com. v. Lehigh Ave. Ry. Co., 129 Pa. St. 405. And see ante, § 179.

[104] Bateman v. Mid-Wales Ry. Co., L. R. 1 C. P. 512, 1 Smith's Cas. 197, 1 Cum. Cas. 312; In re General Estates Co., 3 Ch. App. 758; In re Land Credit Co. of Ireland, 4 Ch. App. 460; Gilbert v.

banking company is a trading company, within this rule.[105] But it is held that such power is not to be implied in the case of a railroad company,[106] a waterworks company,[107] a gas company,[108] a mining company,[109] a cemetery company,[110] or any other corporation not created primarily for the purpose of carrying on trade by buying and selling.[111] In order that these may issue negotiable paper, they must be expressly empowered to do so.[112]

In the United States the rule is different. It is held, both in the federal courts and in the state courts, that a private corporation, if not restricted by its charter, has the implied power to make, draw, accept, or indorse negotiable instruments, and assume all liabilities arising out of such a contract, whenever such a transaction is necessary or proper in the conduct of its business. In the absence of express restrictions, such a corporation, whenever it has the power to borrow money or otherwise incur a debt, has the incidental power to issue or indorse negotiable paper in payment or as security.[113] In like manner,

McAnnany, 28 Upper Can. Q. B. 384.

[105] Berton v. Central Bank, 10 New Bruns. 493.

[106] Bateman v. Mid-Wales Ry. Co., L. R. 1 C. P. 509, 1 Smith's Cas. 197, 1 Cum. Cas. 312.

[107] Broughton v. Manchester & Salford Water Works Co., 3 Barn. & Ald. 1.

[108] Branch v. Roberts, 3 Bing. N. C. 963.

[109] Dickinson v. Valpy, 10 Barn. & C. 128; Gilbert v. McAnnany, 28 Upper Can. Q. B. 384.

[110] Steele v. Harmer, 14 Mees. & W. 831.

[111] Bateman v. Mid-Wales Ry. Co., L. R. 1 C. P. 509, 512, 1 Smith's Cas. 197, 1 Cum. Cas. 312; Bult v. Morrell, 12 Adol. & El. 745; Neale v. Turton, 4 Bing. 149; Thompson v. Universal Salvage Co., 1 Exch. 694.

[112] This view seems to be based largely upon a supposed difficulty in reconciling the principle of the law merchant, that a bona fide purchaser of a negotiable instrument takes it free from defenses existing as between the original parties, and the principle that a corporation is not liable on an ultra vires contract. See Bateman v. Mid-Wales Ry. Co., L. R. 1 C. P. 508, 511, 1 Smith's Cas. 197, 1 Cum. Cas. 312.

[113] Monument Nat. Bank v. Globe Works, 101 Mass. 58, 3 Am. Rep. 322, 1 Cum. Cas. 315, 1 Smith's Cas. 451; Union Bank of Knoxville v. Jacob, 6 Humph. (Tenn.) 515, 1 Smith's Cas. 200, 1 Cum. Cas. 302; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Moss v. Averell, 10 N. Y. 449; Curtis v. Leavitt, 15 N. Y. 66; Barnes v. Ontario Bank, 19 N. Y. 152; Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192; Frye v. Tucker, 24 Ill. 180; Ward v. Johnson, 95 Ill. 215; Morville v. American Tract Soc., 123 Mass. 136, 25 Am. Rep. 40, 1 Smith's Cas. 588; Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co.

whenever a corporation has the power to sell and transfer negotiable paper, it may bind itself by indorsing the same.[114]

"When a corporation," said Judge Comstock in a New York case, "can lawfully purchase property or procure money on loan in the course of its business, the seller or the lender may exact, and the purchaser or borrower must have the power to give, any known assurance which does not fall within the prohibition, express or implied, of some statute. The particular restriction must be sought for in the charter of the corporation, or in some other statute binding upon it; but if not found in that examination, we may safely affirm that it has no existence."[115] In another case it was said that "no question is better settled upon authority, than that a corporation, not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day, or upon demand when such note is given for any of the legitimate purposes for which the company was incorporated."[116]

——**Particular corporations.**—This doctrine applies to manufacturing and trading companies,[117] but it is not limited to

of Quincy, 159 Mass. 505. 38 Am. St. Rep. 453; Wright v. Pipe Line Co., 101 Pa. St. 204, 1 Keener's Cas. 508; Oxford Iron Co. v. Spradley, 46 Ala. 98; Odd Fellows v. Sturgis First Nat. Bank, 42 Mich. 461; Sparks v. Dispatch Transfer Co., 104 Mo. 531, 24 Am. St. Rep. 351; Richmond, Fredericksburg & P. R. Co. v. Snead, 19 Grat. (Va.) 354, 100 Am. Dec. 670; Smith v. Eureka Flour Mills Co., 6 Cal. 1; Came v. Brigham, 39 Me. 35; Rockwell v. Elkhorn Bank, 13 Wis. 653; Grommes v. Sullivan (C. C. A.) 81 Fed. 45; Kneeland v. Braintree Street Ry. Co., 167 Mass. 161; and other cases cited in the notes following.

[114] Bank of Genesee v. Patchin Bank, 13 N. Y. 315; and cases cited in the preceding note and in the notes following.

[115] Curtis v. Leavitt, 15 N. Y. 66. "In general, an express authority is not indispensable to confer upon a corporation the right to borrow money, or to become a party to negotiable paper. A corporation, in order to attain its legitimate objects, may deal precisely as an individual may, who seeks to accomplish the same ends; and this includes the power to borrow money for use in its legitimate business, and the power to give a time engagement to pay the debt, in any form not prohibited by statute." Mr. Justice Blatchford in Re Hercules Mutual Life Assurance Soc., 6 Ben. 35, 37, Fed. Cas. No. 6,402.

[116] Moss v. Averell, 10 N. Y. 449.

[117] Monument Nat. Bank v. Globe Works, 101 Mass. 58, 3 Am. Rep. 322, 1 Cum. Cas. 315, 1 Smith's Cas. 451; Commercial Bank of New Orleans v. Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; Auerbach v. Le Sueur Mill

them, as in England. It has also been applied to railroad companies, including street-railroad companies,[118] canal companies,[119] telegraph companies,[120] turnpike companies and the like,[121] gas companies,[122] electric light companies,[123] and water companies,[124] insurance companies of all kinds,[125] banking companies, including national banks and savings banks,[126] loan companies,[127] commission companies,[128] building and loan associations,[129] agricultural and mechanical associations or societies,[130] mining companies,[131] transfer companies,[132] Odd Fellows associations,[133] a corporation created for the purpose of erecting a monument,[134] religious corporations,[135] etc.

Co., 28 Minn. 291, 41 Am. Rep. 285; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Moss v. Averell, 10 N. Y. 449; Kneeland v. Braintree St. Ry. Co., 167 Mass. 161; Frye v. Tucker, 24 Ill. 180; Temple St. Cable Ry. Co. v. Hellman, 103 Cal. 634.

[118] Union Bank of Knoxville v. Jacobs, 6 Hump. (Tenn.) 515, 1 Smith's Cas. 200, 1 Cum. Cas. 302; Olcott v. Tioga R. Co., 40 Barb. (N. Y.) 179, 27 N. Y. 546, 84 Am. Dec. 298; Richmond, Fredericksburg & P. R. Co. v. Snead, 19 Grat. (Va.) 354, 100 Am. Dec. 670; Indiana & Illinois Cent. R. Co. v. Davis, 20 Ind. 6, 83 Am. Dec. 303.

[119] McMasters v. Reed's Ex'rs, 1 Grant's Cas. (Pa.) 36.

[120] In re Great Western Tel. Co., 5 Biss. 363, Fed. Cas. No. 5,739.

[121] Smith v. Law, 21 N. Y. 299; Lebanon & Royalton Gravel Road Co. v. Adair, 85 Ind. 244.

[122] Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co. of Quincy, 159 Mass. 505, 38 Am. St. Rep. 453; Hays v. Balion Gas Light & Coal Co., 29 Ohio St. 330; Des Moines Gas Co. v. West, 50 Iowa, 26.

[123] Sheridan Electric Light Co. v. Chatham Nat. Bank, 52 Hun (N. Y.) 575.

[124] Partridge v. Badger, 25 Barb. (N. Y.) 171; Gebhard v. Eastman, 7 Minn. 56.

[125] In re Hercules Mutual Life Assurance Soc., 6 Ben. 35, Fed. Cas. No. 6,402; Barker v. Mechanic Fire Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Talladega Ins. Co. v. Peacock, 67 Ala. 253; Orr v. Mercer County Mutual Fire Ins. Co., 114 Pa. St. 387.

[126] Custis v. Leavitt, 15 N. Y. 66; Barnes v. Ontario Bank, 19 N. Y. 152; Ward v. Johnson, 95 Ill. 215; Fifth Ward Sav. Bank of Jersey City v. Jersey City First Nat. Bank, 48 N. J. Law, 513; Donnell v. Lewis County Sav. Bank, 80 Mo. 165; Ballston Spa Bank v. Marine Bank, 16 Wis. 120.

[127] Hascall v. Life Association of America, 5 Hun (N. Y.) 151, 66 N. Y. 616.

[128] Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219.

[129] Davis v. West Saratoga Building Union, 32 Md. 285.

[130] Thompson v. Lambert, 44 Iowa, 239.

[131] Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192; Larwell v. Hanover Savings Fund Soc., 40 Ohio St. 282; Moss v. Oakley, 2 Hill (N. Y.) 265; Magee v. Mokelumne Hill Canal & Min. Co., 5 Cal. 258.

[132] Sparks v. Dispatch Transfer Co., 104 Mo. 531, 24 Am. St. Rep. 351.

[133] Odd Fellows v. Sturgis First Nat. Bank, 42 Mich. 461.

[134] Hayward v. Pilgrim Society, 21 Pick. (Mass.) 270.

[135] Cattron v. Manchester First Universalist Society, 46 Iowa, 106.

(b) When the power is not implied.—Power on the part of a corporation to become a party to a negotiable instrument is not implied when the nature and objects of the corporation are such that such a transaction cannot be necessary or proper in the conduct of its business.[136] And no corporation, even though it may be a trading company, has any power to make, draw, accept, or indorse negotiable paper for a purpose which is foreign to the objects for which it was created.[137] A railroad company, for example, since it has no power to establish a steamboat line to run in connection with its road, but beyond its terminus, has no power to give a promissory note for the price of a steamboat purchased by it for such purpose.[138]

(c) Express or implied prohibition or restriction.—Of course, a corporation cannot lawfully become a party to a negotiable instrument in violation of an express or implied prohibition or restriction in its charter. Thus, a negotiable instrument payable at a future day is *ultra vires* and void, at least as between the original parties and purchasers who are not in the position of *bona fide* holders for value, when a statute prohibits the corporation from issuing negotiable instruments not payable on demand.[139] The same is true of an instrument issued by a cor-

[136] Police Jury v. Britton, 15 Wall. (U. S.) 566.

[137] Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322, 1 Cum. Cas. 315, 1 Smith's Cas. 451; National Park Bank of New York v. German-American Mutual Warehousing & Security Co., 116 N. Y. 281, 1 Keener's Cas. 513, 1 Cum. Cas. 318; People v. River Raisin & Lake Erie R. Co., 12 Mich. 389, 86 Am. Dec. 64; Straus v. Eagle Ins. Co., 5 Ohio St. 59; James' Adm'r v. Rogers, 23 Ind. 451.

[138] Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146.

[139] Root v. Godard, 3 McLean, 102, Fed. Cas. No. 12,037; Hayden v. Davis, 3 McLean, 276, Fed. Cas. No. 6,259; Davis v. Bank of River Raisin, 4 McLean, 387, Fed. Cas. No. 3,626; Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333.

Such a prohibition applies to certificates of deposit issued by a bank, payable at a future day. Bank of Orleans v. Merrill, 2 Hill (N. Y.) 295.

And it is not limited to bills and notes intended to circulate as money, but applies also to such as are issued for a debt contracted by a corporation in the ordinary course of its business as for money borrowed, goods purchased, services, etc. Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Bank Commissioners v. St. Lawrence Bank, 7 N. Y. 513.

poration in violation of a prohibition against the issue of bills, notes, or other evidences of debt "upon loan or for circulation as money."[140]

An express grant of power to borrow money and issue bonds therefor, or to borrow money and secure the payment thereof by bond and mortgage, does not impliedly prohibit a corporation from borrowing money necessary in its business, and issuing negotiable notes or bills therefor.[141] And it has been held that a prohibition against the issue by a corporation of bills, notes, or other evidences of debt, "upon loans, or for circulation as money," or against dealing in commercial paper, is intended merely to prohibit the business of banking, and does not apply to the incidental issue of bills or notes for money borrowed, or debts otherwise contracted by a corporation, or the receipt and negotiation of bills and notes, in the ordinary course of its business.[142]

Negotiable bills and notes are very different from bonds, and, when issued by a corporation in the course of its business, they are not within a prohibition against or restriction upon the issue of bonds.[143]

§ 182. Accommodation paper.

It is well settled that a corporation has no implied power to issue or indorse bills or notes in which it has no interest for the mere accommodation of another, for such a transaction is ordinarily foreign to the objects for which corporations are created; and it can make no difference that the corporation will be incidentally benefited by such a transaction, or is paid a considera-

[140] New York Life Ins. & Trust Co. v. Beebe, 7 N. Y. 364.

[141] Talladega Ins. Co. v. Peacock, 67 Ala. 253; Lucas v. Pitney, 27 N. J. Law, 221.

[142] Magee v. Mokelumne Hill Canal & Min. Co., 5 Cal. 259; Smith v. Eureka Flour Mills Co., 6 Cal. 1; Davis v. West Saratoga Building Union, 32 Md. 285; Western Cottage Organ Co. v. Reddish, 51 Iowa, 55; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280; Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Buckley v. Briggs, 30 Mo. 452; Curtis v. Leavitt, 15 N. Y. 62; Rockwell v. Elkhorn Bank, 13 Wis. 653; White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co., 12 Ohio St. 601.

[143] Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co. of Quincy, 159 Mass. 505, 38 Am. St. Rep. 453.

tion, or that the transaction is consented to or ratified by all the stockholders.[144]

This rule, however, does not prevent a corporation from raising money and making a loan to another corporation by indorsing its paper, when it is authorized to make the loan,[145] or from issuing or indorsing paper for the benefit of another

[144] National Park Bank of New York v. German-American Mutual Warehousing & Security Co., 116 N. Y. 281, 1 Keener's Cas. 513, 1 Cum. Cas. 318; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322, 1 Cum. Cas. 315, 1 Smith's Cas. 451.

And see Johnston v. Charlottesville Nat. Bank, 3 Hughes, 657, Fed. Cas. No. 7,425; National Park Bank of New York v. Remsen, 43 Fed. 226; Hall v. Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75; Aetna Nat. Bank v. Charter Oak Life Ins. Co., 50 Conn. 182; Credit Co. v. Home Machine Co., 54 Conn. 387, 1 Am. St. Rep. 123; Jacobs Pharmacy Co. v. Southern Banking & Trust Co., 97 Ga. 573; Pick v. Ellinger, 66 Ill. App. 570; Beecher v. Dacey, 45 Mich. 92; National Bank of Republic of New York v. Young, 41 N. J. Eq. 531; Bank of Genesee v. Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125; Fox v. Rural Home Co., 90 Hun (N. Y.) 365, 157 N. Y. 684; Steiner v. Steiner Land & Lumber Co., 120 Ala. 128; Blake v. Domestic Mfg. Co. (N. J. Ch.) 38 Atl. 241; Pick v. Ellinger, 66 Ill. App. 570; Park Hotel Co. v. Fourth Nat. Bank of St. Louis (C. C. A.) 86 Fed. 742; Lyon, Potter & Co. v. First Nat. Bank of Sioux City (C. C. A.) 85 Fed. 120.

There is a dictum by Judge Brown to the contrary in the late New York case, Martin v. Niagara Falls Paper Mfg. Co., 122 N. Y. 165, but it is merely dictum, with no citation of authority to support it, and it is directly contrary to the settled rule in other jurisdictions, and to the rule clearly established by the actual decisions in New York. See the later New York case of Fox v. Rural Home Co., 90 Hun (N. Y.) 365, affirmed in 157 N. Y. 684, and the other cases in that state cited above in this note.

In a late case in the United States circuit court for the western district of Arkansas, it was held that a purely private corporation may bind itself by the execution of accommodation paper, if all the stockholders consent. Murphy v. Arkansas & Louisiana Land & Improvement Co., 97 Fed. 723. The only authority, however, which is cited by the court, is Cook on Corporations (volume 1, § 3), and the only authority cited by Mr. Cook is the New York case of Martin v. Niagara Falls Paper Mfg. Co., 122 N. Y. 165, above referred to, in which, as we have seen, all that was said to this effect by Judge Brown was mere dictum, and is opposed to the other cases in that state, both prior and subsequent.

In this connection, we must not overlook the fact that the doctrine that a corporation has no powers except such as are conferred, expressly or impliedly, by its charter, does not depend in any way at all upon consent or want of consent upon the part of stockholders. An ultra vires contract by a corporation is none the less ultra vires because it is consented to or ratified by all the stockholders. See ante, §§ 125, 171.

[145] Holmes, Booth & Haydens v. Willard, 125 N. Y. 75. In this case it was held that a corporation authorized to deal in manufactured goods, and needing such goods for

when it has the power, express or implied, to become surety or guarantor, as explained in another section.[146] Such paper is not mere accommodation paper.

§ 183. Power to issue bonds—(a) In general.—In the absence of express restrictions, a corporation has the implied power to execute and issue bonds for legitimate corporate purposes, and it may issue them in any form not prohibited by law.

Whenever a corporation has the power to borrow or raise money, to purchase property, to contract for services or labor, to pay debts or take up bonds of another corporation, or to otherwise contract a debt, it has the implied power, as an incident thereto, to issue its bonds in payment or as security, provided it violates no express or implied prohibition or restriction in its charter or any other statute.[147]

"There seems to be no reason," said Judge Hoar in a Massachusetts case, "why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, ex-

sale, had the incidental power to aid a manufacturer by advancing him money to be repaid in goods, and that it could do so by indorsing his notes so as to enable him to raise the money by discounting the same.

[146] Post, § 184. See Holmes, Booth & Haydens v. Willard, 125 N. Y. 75.

[147] Royal British Bank v. Turquand, 5 El. & Bl. 248; Com. v. Smith, 10 Allen (Mass.) 448, 455, 87 Am. Dec. 672, 1 Keener's Cas. 650, 1 Cum. Cas. 331, 1 Smith's Cas. 190; Gloninger v. Pittsburgh & Connellsville R. Co., 139 Pa. St. 13; Mead v. New York, Housatonic & N. R. Co., 45 Conn. 199; Nelson v. Hubbard, 96 Ala. 238; Whitewater Valley Canal Co. v. Vallette, 21 How. (U. S.) 424; McMasters v. Reed's Ex'rs, 1 Grant's Cas. (Pa.) 36; Seymour v. Spring Forrest Cemetery Ass'n, 19 N. Y. Supp. 94; Smith v. Law, 21 N. Y. 296; North Hudson Mutual Building & Loan Ass'n v. Hudson First Nat. Bank, 79 Wis. 31; Philadelphia & Sunbury R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

A grant to a railroad company of power to mortgage its road includes power to borrow money and issue bonds secured by a mortgage. Gloninger v. Pittsburgh & Connellsville R. Co., 139 Pa. St. 13.

A corporation having the power to issue bonds may pledge them as security for money borrowed or for the payment of a pre-existing debt. Nelson v. Hubbard, 96 Ala. 238; Duncomb v. New York, Housatonic & N. R. Co., 84 N. Y. 190; Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423; Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323; Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co., 79 Fed. 842.

press or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement."[148]

Want of power to mortgage its property cannot affect the power to issue bonds.[149]

(b) Form and conditions.—When a corporation has the power to issue bonds, and there are no express or implied restrictions in the way, it may issue them in any form and with any conditions or terms it may see fit.[150] It may issue a bond containing a warrant of attorney to confess judgment on breach of conditions.[151] And it may execute a bond in judicial proceedings, as an attachment bond,[152] a bond for costs,[153] or an appeal bond.[154]

(c) Negotiable bonds.—Having the power to issue negotiable paper, as explained in another section, a corporation may issue negotiable bonds.[155] And bonds issued by a corporation, although under seal, are to be regarded as negotiable, whenever an intention to make them so appears from the form in which they are executed, and the manner in which they are put in circulation.[156]

[148] Com. v. Smith, 10 Allen (Mass.) 448, 455, 87 Am. Dec. 672, 1 Keener's Cas. 650, 1 Cum. Cas. 331, 1 Smith's Cas. 190.

[149] Bonds issued by a corporation are not invalid because secured by an ultra vires mortgage. Philadelphia & Sunbury R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

[150] Willoughby v. Chicago Junction Railway & Union Stockyards Co., 50 N. J. Eq. 656; Philadelphia & Sunbury R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

[151] Stratton v. Allen, 16 N. J. Eq. 229.

[152] Tanner & Delaney Engine Co. v. Hall, 22 Fla. 391.

[153] Young v. Brompton, C. G. & R. Waterworks Co., 1 Best & S. 675.

[154] Collins v. Hammock, 59 Ala. 448.

[155] Curtis v. Leavitt, 15 N. Y. 66; Lehman Bros. v. Tallassee Mfg. Co., 64 Ala. 567; and cases cited in the note following.

[156] In re Blakely Ordnance Co., 3 Ch. App. 154; In re General Estates Co., 3 Ch. App. 758; American Nat. Bank v. American Wood Paper Co., 19 R. I. 149, 61 Am. St. Rep. 746, 1 Smith's Cas. 221; White v. Vermont & Massachusetts R. Co., 21 How. (U. S.) 575, 1 Cum. Cas. 133; Mercer County v. Hacket,

"This species of bonds," said Mr. Justice Grier in 1863, in the supreme court of the United States, "is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to public policy in making them negotiable, if the necessity of commerce require that they should be so. A mere technical dogma of the courts of common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial

1 Wall. (U. S.) 83; Kneeland v. Lawrence, 140 U. S. 209; Chicago Railway Equipment Co. v. Merchants' Bank, 136 U. S. 268; DeHass v. Roberts, 59 Fed. 853; Brainard v. New York & Harlem R. Co., 25 N. Y. 496; Lehman Bros. v. Tallassee Mfg. Co., 64 Ala. 567; Reid v. Bank of Mobile, 70 Ala. 199; Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423; Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323; Mead v. New York, Housatonic & N. R. Co., 45 Conn. 222; Peoria & Springfield R. Co. v. Thompson, 103 Ill. 187; Haven v. Grand Junction Railroad & Depot Co., 109 Mass. 88; Kerr v. City of Corry, 105 Pa. St. 282; National Exchange Bank v. Hartford, Providence & F. R. Co., 8 R. I. 375, 5 Am. Rep. 582; Hebberd v. Southwestern Land & Cattle Co., 55 N. J. Eq. 18; Louisville, New Albany & C. R. Co. v. Louisville Trust Co., 174 U. S. 552.

A coupon bond, issued by a corporation, under seal, and payable to a trust company, or bearer, or, in case of registry, to the registered holder, in ten years after date, with a reservation of the privilege of paying it at any time after five years, bearing interest at a certain rate per annum, payable semiannually, is a negotiable security.

recognition, not only in this court, but of nearly every state in the Union, is well known and admitted."*

(d) Express or implied prohibition or restriction.—Of course, a corporation cannot lawfully issue bonds, any more than it can do any other act, in violation of an express or implied prohibition or restriction in its charter, or in any other statute,[157] or without complying with charter or statutory requirements, if any, as to form, time of payment, amount, etc.[158] Bonds, at least if not negotiable, are not within a prohibition against the issue of bills and notes.[159] A prohibition against the *issue* of bonds by a corporation prohibits a pledge.[160]

(e) Issue for unauthorized purposes.—No corporation can lawfully issue bonds for a purpose which is entirely foreign to the business or objects for which it was created.[161] Thus, a corporation cannot issue a bond or bonds for the purpose of lending its credit to promote the interest of another corporation or person, unless authorized.[162] Nor can a corporation, like a railroad company, for example, raise money by the issue of irredeemable bonds entitling the holder to share in its earnings.

American Nat. Bank v. American Wood Paper Co., 19 R. I. 149, 61 Am. St. Rep. 746, 1 Smith's Cas. 221.

*Mercer County v. Hacket, 1 Wall. (U. S.) 83.

[157] In re Pooley Hall Colliery Co., 21 Law T. (N. S.) 690; Steelman v. Baker, 53 N. J. Eq. 672; Farmers' Loan & Trust Co. v. San Diego Street Car Co., 45 Fed. 518; National Foundry & Pipe Works v. Oconto Water Co., 52 Fed. 29.

As to the issue of bonds in excess of the amount of stock paid in, in violation of a prohibition, see In re Pooley Hall Colliery Co., 21 Law T. (N. S.) 690; Steelman v. Baker, 53 N. J. Eq. 672.

A requirement of the consent of or notice to stockholders is intended for their protection merely, and does not affect the power of the corporation. Nelson v. Hubbard, 96 Ala. 238; Beecher v. Marquette & Pacific Rolling Mill Co., 45 Mich. 103.

[158] Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Keener's Cas. 650, 1 Cum. Cas. 331, 1 Smith's Cas. 190.

[159] Leavitt v. Blatchford, 17 N. Y. 521.

[160] Pfister v. Milwaukee Electric Ry. Co., 83 Wis. 86; National Foundry & Pipe Works v. Oconto Water Co., 52 Fed. 29; Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co., 79 Fed. 842. Compare Mowry v. Farmers' Loan & Trust Co., 46 U. S. App. 164, 76 Fed. 38.

[161] Smith v. Alabama Life Ins. & Trust Co., 4 Ala. 558.

[162] Smith v. Alabama Life Insurance & Trust Co., 4 Ala. 558; Northside Ry. C. v. Worthington, 88 Tex. 562.

The power to issue such bonds is not included in the power to borrow money.[163]

(f) Issue at a discount.—A corporation, when it is authorized, expressly or impliedly, to raise money or pay debts by issuing bonds, may issue them at a discount,[164] unless it is prohibited by its charter, or by the statute against usury,[165] or some other statute. But it cannot lawfully issue them in violation of an express provision against their issue for less than par, or for less than a certain percentage of their par value.[166]

(g) Fictitious increase of indebtedness.—In some jurisdictions, to prevent a fictitious increase of their indebtedness by corporations, it is provided that a corporation shall not issue bonds except for money paid, labor done, or property actually received, and that all fictitious increase of indebtedness shall be void, and bonds issued in violation of this provision are void,[167] unless they have passed into the hands of a *bona fide* purchaser for value.[168] Under such a provision a corporation has no power to give away its bonds, or to sell them on credit, or otherwise dispose of them except for a present consideration, and for a corporate purpose.[169]

The prohibition, however, is not to be construed so as to re-

[163] Taylor v. Philadelphia & Reading R. Co., 7 Fed. 386.

[164] In re Anglo-Danubian Steam Navigation & Colliery Co., L. R. 20 Eq. 339; Gamble v. Queen's County Water Co., 123 N. Y. 91, reversing 52 Hun, 166.

And see Coe v. Columbus, Pique & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; North Side Ry. Co. v. Worthington, 88 Tex. 562.

[165] Commissioners of Craven v. Atlantic & North Carolina R. Co., 77 N. C. 289.

It may be exempted from the operation of the usury laws by being authorized to borrow "on such terms as its directors may determine upon." Traders' Nat. Bank of Charlotte v. Lawrence Mfg. Co., 96 N. C. 298.

[166] National Foundry & Pipe Works v. Oconto Water Co., 52 Fed. 29; Neuse River Nav. Co. v. Newbern Com'rs, 7 Jones (N. C.) 275; Pfister v. Milwaukee Electric Ry. Co., 83 Wis. 86.

[167] Peoria & Springfield R. Co. v. Thompson, 103 Ill. 187; Farmers' Loan & Trust Co. v. San Diego St. Car Co., 45 Fed. 518; and cases in the notes following.

As to such a provision with respect to the issue of stock, see post, § 391.

[168] Post, § 217.

[169] Peoria & Springfield R. Co. v. Thompson, 103 Ill. 187, 202.

It cannot issue bonds in payment of or as security for a pre-existing debt. Farmers' Loan & Trust Co. v. San Diego Street Car Co., 45 Fed. 518.

Nor can it issue bonds to pay script dividends. Merz v. Interior Conduit & Insulation Co., 87 Hun (N. Y.) 430.

strict and hamper corporations in the management of their legitimate business, or in procuring the means to accomplish their legitimate objects. To bring a case within the prohibition, it must appear that the corporation has fraudulently issued, or is about to fraudulently issue and put upon the market, bonds which do not represent, and are not intended to represent, money or property received. It does not prevent a corporation from disposing of its bonds for the best price which it can obtain, though it may be less than par.[170] Nor does it require that bonds and the property or labor for which they are issued shall be of equal market value.[171]

§ 184. Power to become surety or guarantor—(a) In general.—As a general rule, a contract of suretyship or guaranty is foreign to the objects for which corporations are created, and is therefore unauthorized; but such a contract is within the powers of a corporation whenever, under the circumstances, it is a necessary or proper means of accomplishing a purpose authorized by its charter.

(b) Power to become surety or guarantor not generally implied.—Ordinarily, in the absence of express authority, a corporation has no power to enter into a contract as surety or guarantor, and thus lend its credit to another corporation or person, for such an act is not usually necessary or proper in the conduct of its business.[172] The objection to such a contract, said Judge

[170] Memphis & Little Rock R. Co. v. Dow, 120 U. S. 287; Brown v. Duluth, Messabe & N. Ry. Co., 53 Fed. 889; Peoria & Springfield R. Co. v. Thompson, 103 Ill. 187; Nelson v. Hubbard, 96 Ala. 238; Underhill v. Santa Barbara Land, Bldg. & Imp. Co., 93 Cal. 300. And see post, § 391.

That giving bonus stock with bonds does not invalidate the bonds, see Dummer v. Smedley, 110 Mich. 466; Dickerman v. Northern Trust Co., 176 U. S. 181, affirming 80 Fed. 450.

[171] See the cases in the preceding note.

The provision is not violated by a deposit as collateral of bonds in excess of the debt secured. Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co., 79 Fed. 842; Dexter v. McClellan, 116 Ala. 37; Illinois Trust & Sav. Bank v. Pacific Ry. Co., 117 Cal. 332.

A statute prohibiting a corporation from issuing bonds except for money, labor done, or property actually received, does not prohibit a corporation from delivering bonds to a contractor as an advance payment on a contract to construct a railroad worth the amount of the bonds. Hudson River & Washington County Midland R. Co. v. Hanfield, 36 App. Div. (N. Y.) 605.

[172] Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas.

Taft, "is that it risks the funds of the company in a different enterprise and business under the control of another and different person or corporation, contrary to what its stockholders, its creditors, and the state have the right from its charter to expect."[173] It can make no difference that the corporation is benefited by the contract, or receives a consideration, if the contract is not within the scope of its business.[174]

(c) When the power is implied.—The general rule, however, that a corporation has no implied power to become guarantor or

446, 1 Cum. Cas. 136; Lucas v. White Line Transfer Co., 70 Iowa, 541, 59 Am. Rep. 449, 1 Keener's Cas. 460; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Keener's Cas. 457, 1 Cum. Cas. 173, 1 Smith's Cas. 564; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26; Winterfield v. Cream City Brewing Co., 96 Wis. 239.

And see Humboldt Min. Co. v. American Manufacturing, Mining & Milling Co., 62 Fed. 356; Pennsylvania R. Co. v. St. Louis, Alton & T. H. R. Co., 118 U. S. 290; Aetna Nat. Bank v. Charter Oak Life Ins. Co., 50 Conn. 167; Twiss v. Guaranty Life Ass'n, 87 Iowa, 733, 43 Am. St. Rep. 418; Savage Mfg. Co. v. Worthington, 1 Gill (Md.) 284; Knickerbocker v. Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595; Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 335; Bridgeport City Bank v. Empire Stone Dressing Co., 19 How. Pr. (N. Y.) 51; Koehler v. Reinheimer, 20 Misc. Rep. (N. Y.) 62; Culver v. Reno Real Estate Co., 91 Pa. St. 376; Memphis Grain & Package Elevator Co. v. Memphis & Charleston R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798; Northside Ry. Co. v. Worthington, 88 Tex. 562; Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co., 7 Wis. 59; Johansen v. Chaplin, 6 Montreal Law Rep. (Q. B.) 111; Louisville, New Albany & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, modifying 75 Fed. 433; Park Hotel Co. v. Fourth Nat. Bank of St. Louis (C. C. A.) 86 Fed. 742; Ward v. Joslin (C. C. A.) 105 Fed. 224; Rogers v. Jewell Belting Co., 184 Ill. 574, reversing 84 Ill. App. 249; M. V. Monarch Co. v. Farmers' & Drovers' Bank (Ky.) 49 S. W. 317.

[173] Humboldt Min. Co. v. American Manufacturing, Mining & Milling Co., 62 Fed. 356. And see Tod v. Kentucky Union Land Co., 57 Fed. 47, 51.

A corporation organized to manufacture and sell beer, etc., and carry on a general brewing business, has no implied power to become a surety on an appeal bond in a suit between third parties, unless the act is reasonably necessary to accomplish a purpose for which it was formed. Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26.

[174] Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Keener's Cas. 457, 1 Cum. Cas. 173, 1 Smith's Cas. 564; Filon v. Miller Brewing Co., 60 Hun (N. Y.) 582, 15 N. Y. Supp. 57; Rogers v. Jewell Belting Co., 184 Ill. 574, reversing 84 Ill. App. 249; and other cases above cited. See, also, ante, § 125.

As was said by Judge Dwight in a New York case, "whether an act is within corporate powers depends upon the character of the act itself, and not upon the consideration for which it is performed." Filon v. Miller Brewing Co., 60 Hun, 582, 15 N. Y. Supp. 57.

surety, is based upon the ground that such a transaction is foreign to the objects of its creation, and not upon the ground that there is an absolute want of power on the part of a corporation to bind itself by such a contract. Such power exists, of course, in the case of surety and guaranty companies, created for the express purpose of entering into such contracts as a business or as a part of their business.[175] It also exists in the case of other corporations, not expressly authorized, whenever it is necessary to enable them to accomplish the objects for which they are created, or whenever the particular transaction is reasonably necessary or proper in the conduct of their business.[176]

(d) Illustrations.—While these general rules are everywhere recognized in the abstract, the courts have not always agreed in their application. The soundness of some of the decisions is very clear, but others are doubtful. In a leading English case, it was very properly held, under the circumstances of the case, that a railroad company had no power to guaranty the payment of dividends on the stock of a steamship company organized for the purpose of transporting passengers beyond the terminus of its road, however much it might be benefited by the operation of the steamboat line, as the contract was altogether foreign to the business of the railroad company.[177] For the same reason, a railroad company cannot guaranty dividends on the stock of a

[175] See Gans v. Carter, 77 Md. 1; Gutzeil v. Pennie, 95 Cal. 598.

A statute allowing surety companies to execute as surety bonds in judicial proceedings, and bonds of guardians, trustees, etc., is constitutional. Steel v. Auditor General, 111 Mich. 381.

[176] Tod v. Kentucky Union Land Co., 57 Fed. 47; Green Bay & Minnesota R. Co. v. Union Steamboat Co., 107 U. S. 98; Low v. California Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629; Mercantile Trust Co. v. Kiser, 91 Ga. 636; Smead v. Indianapolis, Pittsburgh & C. R. Co., 11 Ind. 104; Thomas v. City Nat. Bank of Hastings, 40 Neb. 501; Arnot v. Erie Ry. Co., 67 N. Y. 315; Connecticut Mutual Life Ins. Co. v. Cleveland, Columbus & C. R. Co., 41 Barb. (N. Y.) 10.

A contract by which a street railroad company, in order to procure a right of way over streets running through lands owned by a land company, guarantied that certain lots of the latter would become worth a certain price, and agreed to pay the difference between such price and what the lots would bring at auction, was held to be within the powers of the company. Vanderveer v. Asbury Park & Belmar Street Ry. Co., 82 Fed. 355.

[177] Colman v. Eastern Counties R. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136. And see

grain elevator company, to induce persons to subscribe for such stock;[178] a banking corporation cannot guaranty a contract between other parties for the delivery of building materials,[179] or guaranty the payment by a customer of the hire of a steamship under a charter party,[180] or become surety on the bond of a public officer.[181]

On the other hand, a corporation expressly or impliedly authorized to aid another, as a railroad company authorized to aid another such company in constructing its road, may extend aid by guarantying the bonds of the other company to enable it to raise money thereon.[182] Where a short line of railroad was necessary to enable a lumber corporation to reach its timber lands, it was held that it had the implied power to aid a railroad company in constructing the road by guarantying the interest on its bonds.[183] The same is true of a corporation created for the purpose of acquiring mining and timber lands, and rights of way

Tomkinson v. Southeastern Ry. Co., 35 Ch. Div. 677.

It is otherwise if the charter of a railroad company authorizes it to make contracts with a steamboat company in relation to the carriage of passengers beyond its terminus. Green Bay & Minnesota R. Co. v. Union Steamboat Co., 107 U. S. 98.

That a railroad company cannot guaranty the bonds of another railroad company unless authorized, see Louisville, New Albany & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, modifying 75 Fed. 433.

178 Memphis Grain & Package Elevator Co. v. Memphis & Charleston R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798.

In a Wisconsin case it was held that a plank-road company could not guaranty the payment of a loan made to another plank-road company to enable the latter to build its road, although it would be benefited thereby; and that, having done so, and having paid the money, it could not recover the same from the other company. Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co., 7 Wis. 59.

179 Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 335.

180 Johansen v. Chaplin, 6 Montreal Law Rep. (Q. B.) 111.

181 In re Miners' Bank of Summit Hill, 13 Wkly. Notes Cas. (Pa.) 370.

182 Zabriskie v. Cleveland, Columbus & C. R. Co., 23 How. (U. S.) 381; Connecticut Mutual Life Ins. Co. v. Cleveland, Columbus & C. R. Co., 41 Barb. (N. Y.) 10.

183 Mercantile Trust Co. v. Kiser, 91 Ga. 636.

Under a statute giving mining and manufacturing companies power to purchase or subscribe for so much stock of transportation companies as they may deem necessary to procure proper transportation facilities, such a corporation may guaranty the bonds of a railroad company, and mortgage its property to secure the same, in consideration of transportation facilities, and to enable the company to provide the same. Central Trust Co.

for the purpose of exporting its products.[184] A railroad company authorized to make any contract with any other railroad company which its directors may deem proper, "for the transportation of freight and passengers, or for the use of its road," may guaranty payment of the expense of altering the gauge of another company's road, so as to enable it to use the same.[185]

When the charter of a railroad company or other corporation authorizes it to purchase or lease the property of another corporation or person, it has the power to guaranty the bonds or other obligations of the other as a consideration for the purchase or lease.[186] A corporation needing a boarding place for its workmen may, to induce a person to erect and keep a boarding house, guaranty a certain number of boarders.[187]

A corporation may guaranty the payment of bonds, notes and other evidences of debt owned by it, in order to negotiate or sell the same.[188] And a corporation may guaranty or become surety upon the obligation of another when such a transaction is necessary in order to procure the payment of a debt due to it, or when, by such means, it pays a debt which it owes.[189]

of New York v. Columbus, Hocking Valley & T. Ry. Co., 87 Fed. 815.

[184] Marbury v. Kentucky Union Land Co., 22 U. S. App. 267, 62 Fed. 335; Tod v. Kentucky Union Land Co., 57 Fed. 47.

[185] Smead v. Indianapolis, Pittsburgh & C. R. Co., 11 Ind. 104. And see Connecticut Mutual Life Ins. Co. v. Cleveland, Columbus & C. R. Co., 41 Barb. (N. Y.) 10.

[186] Low v. California Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629.

When a partnership is incorporated, the corporation may take the property of the firm and guaranty its obligations. Waterman's Appeal, 26 Conn. 96; McLellan v. Detroit File Works, 56 Mich. 579.

[187] Smith v. Norwich Board of Water Com'rs, 38 Conn. 208.

[188] Mississippi & Missouri R. Co. v. Howard, 7 Wall. (U. S.) 392; People's Bank of Belleville v. Manufacturers' Nat. Bank of Chicago, 101 U. S. 181; Arnot v. Erie Ry. Co., 67 N. Y. 315; Thomas v. City Nat. Bank of Hastings, 40 Neb. 501; Atchison, Topeka & S. F. R. Co. v. Fletcher, 35 Kan. 236; Dabney v. State Bank, 3 S. C. 124; Ellerman v. Chicago Junction Railways & Union Stockyards Co., 49 N. J. Eq. 217; Broadway Nat. Bank v. Baker (Mass.) 57 N. E. 603.

[189] In re West of England Bank, 14 Ch. Div. 317.

A corporation organized to carry on a mercantile business has power to indorse notes of a third person, from whom it buys merchandise, in payment for such merchandise. National Bank of Commerce in Denver v. Allen (C. C. A.) 90 Fed. 545.

Where a corporation, in acquiring land for its legitimate purposes, causes its employe to give his note in payment, it may properly guaranty its payment. Lake Street Elevated R. Co. v. Carmichael, 82 Ill. App. 344.

It has been held that a railroad company or a manufacturing and trading company cannot, in order to increase its business and profits, guaranty the payment of the expenses of a musical festival or other gathering to be held in the city in which it does business,[190] but there are decisions to the contrary.[191] There is also a conflict in the decisions as to whether a corporation created for the purpose of manufacturing or trading may guaranty or become surety on contracts for the purpose of selling its goods.[192]

§ 185. Power to enter into copartnership or joint contract—(a) In general.—As a general rule, a corporation has no power to enter into a copartnership, unless the power is expressly conferred. The rule, however, does not prevent the law from imposing upon a corporation the liability of a partner. Nor does it apply where the sole management of the business of the copartnership is intrusted to the corporation, or prevent a corporation from owning property in common with another, and making joint contracts.

(b) Power to enter into copartnership not authorized.—Unless the power is expressly conferred, as is seldom the case, a corporation, as a general rule, has no power to enter into a contract

[190] Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Keener's Cas. 457, 1 Cum. Cas. 173, 1 Smith's Cas. 564.

[191] Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234; State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407.

[192] In Humboldt Min. Co. v. American Manufacturing, Mining & Milling Co., 62 Fed. 356, it was held that a corporation created for the purpose of manufacturing and selling iron work for mining plants had no power to guaranty the performance of another's contract for the erection of a mining plant, though it thereby made a sale of iron work.

On the other hand, in Wheeler, Osgood & Co. v. Everett Land Co., 14 Wash. 630, it was held that a corporation created for the purpose of manufacturing and dealing in lumber had the power to become surety on the bond of a building contractor, in order to sell its lumber. See, also, Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 81.

According to the weight of authority, a corporation for the purpose of manufacturing and selling beer may guaranty the payment of rent by a saloon keeper in consideration of his selling its beer. Winterfield v. Cream City Brewing Co., 96 Wis. 239; H. Koehler & Co. v. Rainheimer, 26 App. Div. (N. Y.) 1 (reversing 20 Misc. Rep. 62); Field v. Burr Brewing Co., 18 N. Y. Supp. 456; Holm v. Claus Lipsiu's Brewing Co., 21 App. Div. (N. Y.) 204; National Brewing Co. v. Ahlgren, 63 Ill. App. 475; Standard Brewery v. Kelly, 66 Ill. App. 267. And see Brewer & Hoffman

of partnership with another corporation or an individual, for a partnership and a corporation are incongruous.[193] "Such a contract," said the Tennessee supreme court in a late case, "is wholly inconsistent with the scope and tenor of the power expressly conferred and the duties expressly enjoined upon a corporation, whether it be a strictly business and private corporation, or one owing duties to the public, such as a common carrier. In a partnership each member binds the firm when acting within the scope of the business. A corporation must act through its directors or authorized agents, and no individual member can, as such member, bind the corporation. Now, if a corporation be a member of a partnership, it may be bound by any other member of the association, and in so doing he would act, not as an officer or agent of the corporation, and by virtue of authority received from it, but as a principal in an association in which all are equal, and each capable of binding the society by his acts. The whole policy of the law creating and regulating corporations, looks to the exclusive management of the affairs of each corporation by the officers provided for or authorized by its charter. This management must be separate and exclusive, and any arrangement by which the control of the affairs of the corporation should be taken from its stockholders and the

Brewing Co. v. Boddie, 80 Ill. App. 353, 181 Ill. 622.

Contra, Filon v. Miller Brewing Co., 60 Hun (N. Y.) 582, 15 N. Y. Supp. 57; Aaronson v. David Meyer Brewing Co., 26 Misc. Rep. (N. Y.) 655.

[193] Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681, 2 Smith's Cas. 935, 1 Keener's Cas. 661, 1 Cum. Cas. 399; Mallory v. Hanaur Oil Works, 86 Tenn. 598, 1 Keener's Cas. 678; Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Boyd v. American Carbon Black Co., 182 Pa. St. 206, 1 Keener's Cas. 777; Gunn v. Central Railroad & Banking Co., 74 Ga. 509, 2 Cum. Cas. 111.

And see Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Marine Bank of Chicago v. Ogden, 29 Ill. 248; Bishop v. American Preservers' Co., 157 Ill. 284, 48 Am. St. Rep. 317; Chicago & Alton R. Co. v. Mulford, 162 Ill. 533; New York & Sharon Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; People v. North Sugar Refining Co., 22 Abb. N. C. (N. Y.) 164, 121 N. Y. 582, 18 Am. St. Rep. 843, 2 Smith's Cas. 943, 1 Cum. Cas. 570; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170.

Contra, Allen v. Woonsocket Co., 11 R. I. 288, 1 Keener's Cas. 669, 2 Cum. Cas. 91; Ontario Salt Co. v. Merchants' Salt Co., 18 Grant's Ch. (Upper Can.) 540. And see French v. Donohue, 29 Minn. 111.

authorized officers and agents of the corporation would be hostile to the policy of our general incorporation acts."[194]

(c) Contracts within this rule.—This rule applies to any contract which brings the parties within the definition of an *ordinary* partnership,—to any agreement under which the property of the parties is to be held in common, or managed for the common benefit, and each is to share in the profits and losses. In a New Hampshire case two railroad companies agreed to run their roads jointly under the control of a general manager to be chosen by them, the finances of both companies to be managed by a cashier chosen in like manner, the running expenses of the roads to be paid out of the joint profits, and the net profits to be divided between the companies in a certain proportion. It was held that this was a partnership agreement and *ultra vires*.[195] There was a similar decision in a late Tennessee case, where several manufacturing companies entered into a contract under which a committee composed of representatives selected from each corporation took possession and control of the machinery and other property of each company, and managed and operated the same for the common benefit, under an association name, the several companies sharing the profits and losses in certain agreed proportions.[196]

(d) When the rule does not apply—(1) In general.—The rule that a corporation cannot enter into a contract of partnership does not apply when such a contract is expressly authorized by its charter, as it may be.[197] Nor does it apply so as to prevent *the law* from imposing upon a corporation the liability of a partner as to third persons by reason of a contract made by it in furtherance of the objects of its creation, for the law may impose

[194] Mallory v. Hanaur Oil Works, 86 Tenn. 598, 1 Keener's Cas. 678. And see Gunn v. Central Railroad & Banking Co., 74 Ga. 509, 2 Cum. Cas. 111; Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681, 1 Smith's Cas. 935, 1 Keener's Cas. 661, 1 Cum. Cas. 399.

[195] Burke v. Concord R. Co., 61 N. H. 160. And see Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Charlton v. New Castle & Carlisle Ry. Co., 5 Jur. (N. S.) 1096; Galveston, Harrisburg & S. A. Ry. Co. v. Davis, 4 Tex. Civ. App. 468.

[196] Mallory v. Hanaur Oil Works, 86 Tenn. 598, 1 Keener's Cas. 678.

[197] Butler v. American Toy Co., 46 Conn. 136.

such a liability, not only when there was no intention to become a partner, but also when no contract of partnership could have been made.[198]

——**(2) Corporation having sole management.**—The reason for the rule preventing a corporation from entering into a contract of partnership[199] does not apply to a partnership agreement between a corporation and an individual, by which the entire management of the business is intrusted solely to the corporation, as in the case of a contract between a corporation created for the purpose of buying and selling land and an individual, to buy and sell certain lands and share the profits and losses.[200]

——**(3) Authorized traffic agreements between railroad companies.**—Nor does the rule apply to traffic agreements between railroad companies owning connecting lines, by which each company, while retaining the sole management of its own line, is authorized to make contracts for the carriage of passengers and goods over both lines, and each is to share in the profits and losses on such business,[201] or to an agreement by which railroad companies, whose roads form a continuous line, severally appoint the same person as manager, and run through trains.[202]

——**(4) Ownership of property or business in common.**—There is nothing to prevent a corporation from owning real or personal property in common with another corporation or an individual, and by reason of such ownership in common it may acquire rights jointly with its co-owner, or incur joint liabilities.[203] It has also been held that a corporation may own a business jointly

[198] Cleveland Paper Co. v. Courier Co., 67 Mich. 152; Catskill Bank v. Gray, 14 Barb. (N. Y.) 471; French v. Donohue, 29 Minn. 111.

[199] Ante, § 185(b).

[200] Bates v. Coronado Beach Co., 109 Cal. 160, 2 Smith's Cas. 941, 1 Keener's Cas. 683.

[201] Nashua Lock Co. v. Worcester & Nashua R. Co., 48 N. H. 339, 2 Am. Rep. 242; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Najac v. Boston & Lowell R. Co., 7 Allen (Mass.) 329; Hill Mfg. Co. v. Boston & Lowell R. Co., 104 Mass. 122, 6 Am. Rep. 202; Chicago, Peoria & St. L. Ry. Co. v. Ayers, 39 Ill. App. 607, 140 Ill. 644; Chicago, & Alton R. Co. v. Mulford, 162 Ill. 522; Stewart v. Erie & Western Transp. Co., 17 Minn. 372.

[202] State v. Concord R. Co., 59 N. H. 85.

[203] DeWitt v. City of San Francisco, 2 Cal. 289; New York & Sharon Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; Estell v. University of the South, 12 Lea (Tenn.) 476.

with another, as a ferry or a stage line, and that they may jointly conduct the business.[204]

§ 186. Power to loan money—(a) In general.—A corporation has the implied power to loan money whenever the transaction is necessary or proper in the conduct of its business, but it has no such power if there is an express charter or statutory prohibition, or if the transaction is inconsistent with the objects for which it was created.

The power to loan money, by discounting paper or otherwise, is implied, when not expressly conferred, in the case of banking and loan companies,[205] but the implied power to loan money is by no means confined to such corporations. Other corporations have such power, subject to express restrictions, whenever it is reasonably incidental to the transaction of their business, or necessary in order to prevent funds which they are entitled to hold from being unproductive.[206]

——**Illustrations.**—For example, a water company may make advances to a contractor to enable him to construct its works, or to another company engaged in constructing ditches and laying pipes, in order to obtain an additional supply of water required by it.[207] A manufacturing or trading company, for the purpose of disposing of its goods, may make a loan to a person dealing with it, to enable him to carry out a transaction in which he is engaged.[208] And whenever a corporation has the right to hold funds for which there is no present use, it may loan them, in the absence of express restriction, in order to invest them, instead of allowing them to remain idle and unproductive. This

[204] Hackett v. Multnomah Ry. Co., 12 Or. 124, 53 Am. Rep. 327; Calvert v. Idaho Stage Co., 25 Or. 412.

[205] Deloach v. Jones, 18 La. 447.

[206] Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531, 1 Keener's Cas. 811; Farmers' Loan & Trust Co. v. Clowes, 4 Edw. Ch. (N. Y.) 575, 3 N. Y. 470; Life Ass'n of America v. Levy, 33 La. Ann. 1203; Brown v. Elwell, 17 Wash. 442; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; and cases cited in the notes following.

[207] Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620, 628.

[208] Holmes, Booth & Haydens v. Willard, 5 N. Y. Supp. 610, 125 N. Y. 75.

is true of insurance and annuity companies,[209] benevolent associations,[210] railroad companies having surplus funds,[211] etc.

If power is expressly conferred upon a railroad company or other corporation to aid another in the construction of its road or otherwise, it may give such aid by loaning money.[212]

(b) Express or implied prohibition or restriction.—Of course, a corporation has no power to loan its funds in violation of an express prohibition in its charter or any other statute. Nor has a corporation, like a railroad company, water company, manufacturing company, and the like, not created, like banking and loan companies, for the express purpose of making loans, any power to make loans as a business, or for any purpose which is foreign to the objects of its creation. In the case of such corporations as these, the power to make loans is not a principal power, but exists only when incidental to the transaction of the business authorized by their charter.[213] For example, an insurance company cannot lawfully make loans for the purpose of sustaining another corporation, whether the other corporation is engaged in the same or a different business.[214]

§ 187. Power to take and enforce securities—(a) In general.—Unless prohibited by its charter or some other statute, a corporation has the same power as a natural person to take and enforce securities for debts due or to become due under authorized contracts, but it cannot lawfully take security in violation of a charter or statutory restriction, or in an unauthorized transaction.

In the absence of express or implied restrictions, a corpora-

[209] Farmers' Loan & Trust Co. v. Perry, 3 Sandf. Ch. (N. Y.) 339; Farmers' Loan & Trust Co. v. Clowes, 4 Edw. Ch. 575, 3 N. Y. 470.

[210] Western Boatmen's Benev. Ass'n v. Kribben, 48 Mo. 37.

[211] North Carolina R. Co. v. Moore, 70 N. C. 6; Commissioners of Craven v. Atlantic & North Carolina R. Co., 77 N. C. 289. And see City of Baltimore v. Baltimore & Ohio R. Co., 21 Md. 50.

[212] City of Baltimore v. Baltimore & Ohio R. Co., 21 Md. 50.

[213] In re Coltman, 19 Ch. Div. 64; Grand Lodge of Alabama v. Waddill, 36 Ala. 313; Waddill v. Alabama & Tennessee Rivers R. Co., 35 Ala. 323; Chambers v. Falkner, 65 Ala. 448; Berry v. Yates, 24 Barb. (N. Y.) 199; Beach v. Fulton Bank, 3 Wend. (N. Y.) 573; Bond v. Terrell Cotton & Woolen Mfg. Co., 82 Tex. 309, 1 Smith's Cas. 507; Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co., 5 Wis. 173, 7 Wis. 69.

[214] Berry v. Yates, 24 Barb. (N. Y.) 199.

tion, whenever it has the power, express or implied, to loan money or enter into any other contract by which another may become indebted or bound to it, or whenever it has lawfully acquired a claim against another, has the incidental power, to the same extent as an individual would have, to take security for the payment of the debt or performance of the contract.[215] It may not only take a bond or promissory note, and other choses in action,[216] but it may, in the absence of restrictions, as hereafter explained, take a pledge or mortgage of personal property,[217] or a mortgage on real estate,[218] or, subject to exceptions which will be shown in another place, a pledge of its own stock,[219] or of stock in another corporation.[220]

It may take a bond, mortgage, or other security to secure the payment of subscriptions to its capital stock, or notes given for stock,[221] to secure the faithful performance of his duties by an agent,[222] or to secure the payment of any other debt, or performance of any other contract, which is within the powers expressly or impliedly conferred upon it by its charter.[223]

[215] Massey v. Citizens' Bldg. & Sav. Ass'n, 22 Kan. 624; Mann v. Eckford's Ex'rs, 15 Wend. (N. Y.) 512; Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709; Peru Bridge Co. v. Hendricks, 18 Ind. 11; City of Baltimore v. Baltimore & Ohio R. Co., 21 Md. 50; Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322; Western Boatmen's Benev. Ass'n v. Kribben, 48 Mo. 37; and cases in the note following.

[216] Ante, § 147. See Reed v. State Bank, 5 Ark. 193; Massey v. Citizens' Bldg. & Sav. Ass'n, 22 Kan. 624, 632.

[217] Bates v. State Bank, 2 Ala. 465; State v. Rice, 65 Ala. 83; Commercial Bank of Manchester v. Nolan, 7 How. (Miss.) 508; Morris v. Dixon Nat. Bank, 55 Ill. App. 298; Western Boatmen's Benev. Ass'n v. Kribben, 48 Mo. 37.

[218] Cutbill v. Kingdom, 1 Exch. 494; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620; Clark v. Farrington, 11 Wis. 306; Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709; United States Mortgage Co. v. Gross, 93 Ill. 483; Stevens v. Pratt, 101 Ill. 206; Peru Bridge Co. v. Hendricks, 18 Ind. 11; Massey v. Citizens' Bldg. & Sav. Ass'n, 22 Kan. 624; Lathrop v. Commercial Bank of Scotia, 8 Dana (Ky.) 114, 33 Am. Dec. 487; American Mutual Life Ins. Co. v. Owen, 15 Gray (Mass.) 491; Farmers' Loan & Trust Co. v. Clowes, 3 N. Y. 470, 4 Edw. Ch. 575; Crocker v. Whitney, 71 N. Y. 161.

Having the power to take a mortgage on real property, it has the incidental power to provide for insurance of the property. Chicago Building Soc. v. Crowell, 65 Ill. 453.

[219] Post, § 201.

[220] Post, § 194(b).

[221] Clark v. Farrington, 11 Wis. 306; Andrews v. Hart, 17 Wis. 297. See post, § 385.

[222] Peru Bridge Co. v. Hendricks, 18 Ind. 11.

[223] See the cases above cited.

——**Power to enforce security.**—The power of a corporation to take security for a debt or for performance of a contract necessarily includes the power to take all necessary or proper steps to enforce the same as by the sale of collateral,[224] the foreclosure of a mortgage,[225] etc.

(b) Express or implied prohibition or restriction.—As will be shown in another section, a corporation is sometimes allowed to enforce a security taken by it in violation of an express or implied prohibition or restriction, but this is not universally true.[226] The taking of the security in such a case is always *ultra vires,* and may be enjoined in a suit by a stockholder, or may be ground for the forfeiture of the charter of the corporation, and under some circumstances the security may be void and unenforceable.[227]

A prohibition against a loan on a particular kind of security applies to the taking of such security for future advances.[228] According to the maxim, *Expressio unius est exclusio alterius,* an express grant to a corporation of the power to take certain kinds of securities impliedly prohibits it from taking other securities,[229] unless there is something to show that the legislature

[224] Bates v. State Bank, 2 Ala. 465; Deloach v. Jones, 18 La. 447.

A bank, having lawfully loaned money on a crop of cotton as security, may cause the cotton to be shipped and sold by an agent to pay the loan. Deloach v. Jones, 18 La. 447.

[225] Either by action to foreclose, or by sale after advertisement under a power of sale in the mortgage. Gage v. Sanborn, 106 Mich. 269.

[226] Post, § 225.

[227] See Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95; National Bank of Genesee v. Whitney, 103 U. S. 99, 1 Keener's Cas. 567, 1 Cum. Cas. 102; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531, 1 Keener's Cas. 811; Germantown Farmers' Mutual Ins. Co. v. Dhein, 43 Wis. 420, 28 Am. Rep. 549; Bank of Toronto v. Perkins, 8 Can. Sup. Ct. 603; post, § 225.

[228] National Bank of Genesee v. Whitney, 103 U. S. 99, 1 Keener's Cas. 567, 1 Cum. Cas. 102 (sub nom. Crocker v. Whitney, 71 N. Y. 161); Kansas Valley Nat. Bank of Topeka v. Rowell, 2 Dill. 371, Fed. Cas. No. 7,611.

[229] In re Coltman, 19 Ch. Div. 64; Mutual Life Ins. Co. v. Wilcox, 8 Biss. 203, Fed. Cas. No. 9,980; Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95; Smith v. Alabama Life Insurance & Trust Co., 4 Ala. 558; New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100; Daly v. National Life Ins. Co., 64 Ind. 1; North River Ins. Co. v. Lawrence, 3 Wend. (N. Y.) 482; Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. (N. Y.) 31; Pratt v. Short, 79 N.

did not intend such a restriction.[230] See the illustrations in the paragraphs following.

—**Prohibition against real-estate security.**—Corporations are sometimes expressly or impliedly prohibited from taking real-estate security, the object being, it has been said, to prevent hazardous real-estate speculations, and to prevent large accumulations of such property in the hands of corporations.[231] The taking of a mortgage on land, however, is not within an express or implied prohibition against *dealing* in land.[232] When the charter of a corporation, as is the case in the national bank act, specifies its powers, and expressly allows it to loan money on personal securities only, it impliedly prohibits loans on real-estate security.[233]

—**Transactions within such a prohibition.**—Such a prohibition applies where a corporation loans money and takes as security an assignment of both a note and a mortgage on real estate securing the same, executed to the borrower by a third person,[234] but does not apply when a loan is made on the security of a note only, assigned by the borrower to the corporation, though the note is secured by a mortgage to the borrower, which will, without assignment, inure to the benefit of the corporation.[235] Nor does it apply to a loan made on security of the stock of a corporation, because its property consists wholly or partly of real estate;[236] or to a loan on a note on which there is an indorsement by a married woman charging her separate estate;[237] or to a loan by a corporation on a note indorsed by a third person, who is se-

Y. 437, 35 Am. Rep. 531, 1 Keener's Cas. 811.

[230] National Bank of Washington v. Continental Life Ins. Co., 41 Ohio St. 1.

[231] Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95, per Mr. Justice Swayne.

[232] Clark v. Farrington, 11 Wis. 306; Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709.

[233] Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95; National Bank of Genesee v. Whitney, 103 U. S. 99, 1 Keener's Cas. 567, 1 Cum. Cas. 102 (sub nom. Crocker v. Whitney, 71 N. Y. 161).

[234] Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95.

[235] National Bank of Genesee v. Whitney, 103 U. S. 99, 1 Keener's Cas. 567, 1 Cum. Cas. 102 (sub nom. Crocker v. Whitney, 71 N. Y. 161).

[236] Baldwin v. Canfield, 26 Minn. 61. See post, § 378(b).

[237] Third Nat. Bank v. Blake, 73 N. Y. 260.

cured against liability on his indorsement by a mortgage from the maker, even though it may be agreed that in case of default the security shall inure to the benefit of the corporation.[238]

——**Prohibition against personal or personal property security.**—The charter of a corporation sometimes expressly or impliedly prohibits it from making loans on mere personal security, or on personal property, or a particular kind of personal security.[239] The chief difficulty in this connection is in construing the charter. A provision that the funds of a corporation shall be invested in bonds and mortgages on real estate impliedly prohibits loans on mere personal security.[240] But taking a mortgage or pledge of personal property as security for a debt, and enforcing the same by a sale of the property on default in payment is not within a prohibition, express or implied, against dealing in goods.[241]

When money is loaned, and the note of the borrower taken therefor, payable on demand, the note is merely evidence of the debt, and the loan is not on the security of the note.[242] A grant of authority to invest funds in "public stocks *or other securities*" authorizes loans on bonds, notes, bills, and mortgages as well as on stocks, and loans by way of discount.[243] And personal security without a pledge of chattels may be taken under authority to loan "upon personal security and the pledge of chattels."[244]

——**"Personal security"—National bank act.**—A loan on the security of personal property is a loan on "personal security," within the meaning of the national bank act restricting a national bank to loans on such security. As was said in an Ohio

[238] First Nat. Bank of Ft. Dodge v. Haire, 36 Iowa, 443.

[239] See In re Coltman, 19 Ch. Div. 64; North River Ins. Co. v. Lawrence, 3 Wend. (N. Y.) 482.

[240] North River Ins. Co. v. Lawrence, 3 Wend. (N. Y.) 482. And see New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100.

[241] Bates v. State Bank, 2 Ala. 465; Deloach v. Jones, 18 La. 447; Morris v. Dixon Nat. Bank, 55 Ill. App. 298 (board of trade transactions).

[242] United States Trust Co. v. Brady, 20 Barb. (N. Y.) 119.

[243] Duncan v. Maryland Savings Institution, 10 Gill & J. (Md.) 299. And see Detroit Savings Bank v. Truesdall, 38 Mich. 430.

[244] Missouri Loan Bank v. How, 56 Mo. 53.

case, "it is not to be limited, in taking security for discounts and loans, to the personal undertaking of the borrower, or to the security afforded by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, stock of a corporation, and other personal chattels."[245]

Excepted transactions.—When corporations are prohibited from taking a particular kind of security, certain exceptions are generally made. For example, they are allowed to take such security as collateral for a debt previously contracted. Thus, national banks, though prohibited from loaning money on shares of their own stock or real-estate mortgages, are allowed to take such securities in good faith to prevent loss on a debt previously contracted.[246] This does not permit such securities to be taken for debts contemporaneously contracted or for future advances,[247] but it permits them to be taken to secure a note taken in renewal of a note previously given, or on extending the time of payment of a note.[248] This exception, however, does not permit the prohibition to be evaded by loaning money with the understanding that the prohibited security shall afterwards be taken, and afterwards taking it.[249]

[245] Cleveland v. Shoeman, 40 Ohio St. 176. And see Pittsburgh Locomotive & Car Works v. State Nat. Bank of Keokuk, 2 Cent. Law J. 692, Fed. Cas. No. 11,198; Shoemaker v. National Mechanics' Bank, 2 Abb. 422, Fed. Cas. No. 12,801; Third Nat. Bank of Baltimore v. Boyd, 44 Md. 47; Baldwin v. Canfield, 26 Minn. 43.

[246] Allen v. First Nat. Bank of Xenia, 23 Ohio St. 97; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Ornn v. Merchants' Nat. Bank, 16 Kan. 341.

[247] Kansas Valley Nat. Bank of Topeka v. Rowell, 2 Dill. 371, Fed. Cas. No. 7,611; Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95; National Bank of Genesee v. Whitney, 103 U. S. 99, 1 Keener's Cas. 567, 1 Cum. Cas. 102; Fridley v. Bowen, 87 Ill. 151.

For the decisions in the state courts in the two United States supreme court cases above cited, see Crocker v. Whitney, 71 N. Y. 161; Matthews v. Skinker, 62 Mo. 329, 21 Am. Rep. 425.

Compare, however, Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Commercial Bank v. Upper Canada Bank, 7 Grant's Ch. (Upper Can.) 250, 423; Western Assurance Co. v. Taylor, 9 Grant's Ch. (Upper Can.) 471; McDonell v. Upper Canada Bank, 7 Upper Can. Q. B. 252; Bank of Montreal v. McWhirter, 17 Upper Can. C. P. 506.

[248] Howard Nat. Bank of Burlington v. Loomis, 51 Vt. 349; Farmers' & Merchants' Nat. Bank v. Wallace, 45 Ohio St. 152.

[249] Merchants' Nat. Bank of Chicago v. Mears, 8 Biss. 161, Fed. Cas. No. 9,450.

§ 188. Purchase, sale, or lease of property—(a) In general.—In the absence of express restrictions, a corporation has the power to purchase or take a lease of property, real or personal, whenever it is necessary or reasonably incidental to the business for which it was created, but not otherwise; and, subject to the same qualification, it has the power to sell or make a lease of property. When authorized to enter into such a contract, it may agree to any terms and conditions which are usual in such contracts, and which are not prohibited by its charter or by law.

(b) Contracts to purchase property.—In the absence of restrictions in its charter or in some general statute, a corporation has the power to bind itself by a contract to purchase real or personal property whenever the object of the purchase is within the powers conferred upon it by its charter.[250] And when a corporation has the power to bind itself by a contract to purchase property, it may do so on any terms which are not forbidden by its charter or by law.[251] Thus, where a corporation had the power to purchase land, it was held that it might purchase under a contract allowing it to pay therefor any time within one hundred years, requiring it to pay taxes and interest in the meantime, and giving no right to possession until payment.[252] A corporation, on purchasing land, may assume incumbrances,[253] and may agree to pay such a price as may be fixed by arbitrators.[254] On purchasing goods, a corporation may agree to return them on certain conditions.[255]

On the other hand, a corporation has no power to enter at all into a contract to purchase property, real or personal, if it is prohibited by its charter or some other statute from taking or hold-

[250] Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40, 1 Smith's Cas. 588; Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; Old Colony R. Corp. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394. And see ante, §§ 135, 145.

[251] See Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40, 1 Smith's Cas. 588.

[252] Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138.

[253] Woods Inv. Co. v. Palmer, 8 Colo. App. 132.

[254] Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83.

[255] Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40, 1 Smith's Cas. 588.

ing such property, or if the purpose for which it seeks to acquire the property is foreign to the objects for which it was created.[256] Thus, a railroad company, or a banking company, since it cannot acquire land for the purpose of speculation merely, cannot bind itself by a contract to purchase land for such a purpose.[257] The same is true of a contract by a manufacturing company to purchase goods for sale on speculation,[258] of a contract by a railroad or steamboat company to purchase grain for the purpose of selling it again,[259] and of a contract by a turnpike or toll-road company to purchase horses and vehicles for the purpose of transporting passengers over its road.[260]

(c) **Contracts to sell property.**—Whenever a corporation has the power to dispose of its real or personal property, as explained in another place, it has the power to bind itself by a contract to sell.[261] And in making such a contract it may agree to any terms or conditions with respect to the price, the time of payment, delivery, etc., that are not forbidden by law. In other words, it has the same power in this respect as a natural person, except in so far as it may be restrained by its charter.[262]

(d) **Leases.**—The power of a corporation to take a lease of property, and the power to make a lease of its property, have been considered in previous sections.[263] When it has the power to take or make a lease, it has, as an incident thereto, the power to agree to any terms or conditions which are usual or proper in such contracts, and which are not prohibited by its charter or by law. Thus, it may enter into a covenant to pay rent, or to re-

[256] As to when a corporation has, and when it has not, the power to acquire and hold property, see ante, § 132 et seq.

[257] Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Smith's Cas. 493, 1 Doug. (Mich.) 401, 41 Am. Dec. 575.

[258] Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261, 1 Keener's Cas. 762.

[259] Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Cum. Cas. 245, 1 Smith's Cas. 590.

[260] Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Cum. Cas. 148, 1 Smith's Cas. 148.

[261] As to when a corporation may sell its property, and when it may not, see ante, § 152 et seq.

[262] Sistare v. Best, 88 N. Y. 527; De Groff v. American Linen Thread Co., 21 N. Y. 124.

[263] Ante, §§ 141, 153.

pair, etc.,[264] or a covenant to keep the premises insured.[265] And a corporation may hold as tenant from year to year, and become bound by holding over.[266] In most jurisdictions, as we shall see, a corporation is not bound by covenants in an *ultra vires* lease.[267]

§ 189. Power to act as agent or attorney.—A corporation may act as agent or attorney for another when the transaction is within the scope of the business authorized by its charter, but not otherwise.

A corporation has no power to act as agent or attorney for another if the transaction is foreign to the objects for which it was created. Thus, a manufacturing company, unless the power is conferred upon it by its charter, cannot lawfully act as agent for another in selling goods, bonds, or stocks on commission. And neither a national bank nor a savings bank can act as agent or broker in buying and selling bonds or stocks on commission.[268]

There may be circumstances, however, under which a corporation may act as agent for another. Thus, it has been held that a national bank may, as an incident to its power to collect a debt due it, and for which it holds notes of the debtor as collateral, act as the debtor's agent in selling the notes.[269] The same would be true of other property held by a corporation as collateral.

There is nothing in the nature of a corporation to render

[264] Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143.

[265] Jacksonville, M. P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514.

[266] Crawford v. Longstreet, 43 N. J. Law, 325, 1 Keener's Cas. 545.

[267] Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Cum. Cas. 164; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44; post, §§ 213(i), 214(a)(3), (b)(5).

[268] Westinghouse Machine Co. v. Wilkinson, 79 Ala. 312; Peck-Williamson Heating & Ventilating Co. v. Board of Education (Okla.; 1897) 50 Pac. 236; Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 19 Am. St. Rep. 482, 1 Keener's Cas. 819, 1 Smith's Cas. 500; First Nat. Bank of Allentown v. Hoch, 89 Pa. St. 324; Farmers' & Merchants' Nat. Bank of Fremont v. Smith, 40 U. S. App. 690, 77 Fed. 129.

A corporation organized solely for the manufacture of electric appliances has no power to purchase the right to act as agent for the sale of electric supplies manufactured by another corporation. Powell v. Murray, 157 N. Y. 717, affirming 3 App. Div. 273.

[269] Anderson v. Grand Forks First Nat. Bank, 5 N. D. 451.

it incapable of acting as attorney in fact for another, if the transaction is within the powers conferred upon it by its charter. Where the general law authorizes corporations to be formed for any lawful enterprise, business, pursuit, or occupation, a corporation may be formed for the purpose of acting "as the general or special agent, or attorney in fact, for any public or private corporation, or person, in the management or control of real estate or other property, its purchase, sale, or conveyance, etc." And when the articles of a corporation give it such authority, it has the same power as a natural person to execute a valid deed of conveyance of real property as the attorney in fact of another person or corporation. The exercise of such power involves no delegation of powers. "When a corporation," said the court in a late Oregon case, "is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one being, or artificial person, in the performance of its engagement, and involves no delegation of powers. So that, when a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that, in performing the engagement it will act through its agents, *who for that purpose are its faculties,* and whose acts in the discharge of that duty are the acts of the corporation, and, as such, must be considered to be included in the artificial person as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act under the power of attorney without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained."[270]

An incorporated collection agency may act as agent in collecting claims, and may employ attorneys for such purpose.[271]

[270] Killingsworth v. Portland Trust Co., 18 Or. 351, 17 Am. St. Rep. 737.

[271] Snow, Church & Co. v. Hall, 19 Misc. Rep. (N. Y.) 655.

§ 190. Employment of agents, attorneys, and servants—(a) In general.—A corporation has the same power as a natural person, in the absence of restrictions, to employ an agent, attorney, or servant to do acts or enter into contracts which are within the scope of the business authorized by its charter.

It is certainly within the implied powers of a corporation, just as it is within the powers of a natural person, to appoint or employ an agent or servant to do any act or enter into any contract which is within the powers expressly or impliedly conferred upon it by its charter, as to sell its property,[272] or to procure a loan of money,[273] or to procure subscribers to or purchasers of its stock.[274] It has no power, however, to appoint or employ an agent or servant for a purpose which is foreign to the objects for which it was created.[275] A corporation may employ an attorney to prosecute or defend suits, whether the transactions out of which the suits arise are *ultra vires* or not.[276] The mode in which agents may be appointed by a corporation is treated of in another place.[277]

A manufacturing or trading company may enter into a contract of apprenticeship.[278]

(b) Mode of appointing an agent, and ratification.—It was at one time thought that a corporation could not appoint an agent except under the corporate seal,[279] but this doctrine has been

[272] Sistare v. Best, 88 N. Y. 527.

[273] Arapahoe Cattle & Land Co. v. Stevens, 13 Colo. 534.

[274] Metropolitan Coal Consumers' Ass'n v. Scrimgeour [1895] 2 Q. B. 604. See, also, Cincinnati, Indianapolis & C. R. Co. v. Clarkson, 7 Ind. 595; Garrison v. Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; Alabama & Tennessee Rivers R. Co. v. Kidd, 29 Ala. 221; Kitchen v. Cape Girardeau & State Line R. Co., 59 Mo. 514.

[275] In re Phoenix Life Assurance Co., 1 Hem. & M. 433; George v. Nevada Cent. R. Co., 22 Nev. 228.

In Bathe v. Decatur County Agricultural Soc., 73 Iowa, 11, 5 Am. St. Rep. 651, it was held ultra vires for an agricultural society to employ others to run a conveyance for the purpose of transporting persons to and from its fair grounds.

And in George v. Nevada Cent. R. Co., 22 Nev. 228, it was held ultra vires for a railroad company to employ a person to examine and report upon a mine of which its road was the outlet.

[276] National Bank of Guthrie v. Earl, 2 Okla. 617. And see Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121.

[277] See infra, (b).

[278] Burnley Equitable Co-Operative & Industrial Soc. v. Casson [1891] 1 Q. B. 75.

[279] See Horne v. Ivy, 1 Mod. 18, 1 Smith's Cas. 210; post, § 192(e).

abandoned, and it is now well settled, in this country at least, that a corporation may appoint an agent, just as a natural person may, either by writing or orally, and that neither the corporate seal nor a formal vote of the corporators or directors is necessary unless it is expressly required.[280]

——**Estoppel.**—Like a natural person, a corporation may be estopped to deny the authority of a person to act as its agent, by reason of knowingly allowing him to act as having authority.[281] If a person acts as manager or agent of a corporation with the knowledge and acquiescence of the corporators or directors, the corporation is as much bound by his acts as if he had been appointed by formal vote or by an instrument under the corporate seal.[282]

[280] Bank of Columbia v. Patterson's Adm'r, 7 Cranch (U. S.) 299, 1 Keener's Cas. 496, 1 Cum. Cas. 112, 1 Smith's Cas. 213; Topping v. Bickford, 4 Allen (Mass.) 120, 1 Cum. Cas. 118; Sherman v. Fitch, 98 Mass. 59, 1 Smith's Cas. 217; Goodwin v. Union Screw Co., 34 N. H. 378, 1 Cum. Cas. 119.

And see Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338, 357; Reynolds v. Collins, 78 Ala. 94; Everett v. United States, 6 Port. (Ala.) 166, 30 Am. Dec. 584; Crowley v. Genesee Min. Co., 55 Cal. 273; Savings Bank of New Haven v. Davis, 8 Conn. 191; Howe v. Keeler, 27 Conn. 538; John A. Bancroft & Co. v. Wilmington Conference Academy, 5 Houst. (Del.) 577; St. Andrews' Bay Land Co. v. Mitchell, 4 Fla. 192; Board of Education v. Greenebaum, 39 Ill. 609; Hamilton v. New Castle & Danville R. Co., 9 Ind. 359; Lathrop v. Commercial Bank of Scioto, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Badger v. Bank of Cumberland, 26 Me. 428; Perkins v. Portland, Saco & P. R. Co., 47 Me. 573, 74 Am. Dec. 507; Northern Cent. Ry. Co. v. Bastian, 15 Md. 494; Santa Clara Min. Ass'n v. Meredith, 49 Md. 389; Western Bank v. Gilstrap, 45 Mo. 419; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Mumford v. Hawkins, 5 Denio (N. Y.) 355; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Buncombe Turnpike Co. v. McCarson, 1 Dev. & B. (N. C.) 306; Planters' Bank of Fairfield v. Bivingsville Cotton Mfg. Co., 10 Rich. (S. C.) 95; Hopkins v. Gallatin Turnpike Co., 4 Hump. (Tenn.) 403; Ford v. Hill, 92 Wis. 188.

This is true of the appointment of an agent to convey or mortgage real property. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Fitch v. Steam Mill Co., 80 Me. 34; Cook v. Kuhn, 1 Neb. 472.

And it is true of a power of attorney to confess judgment. Ford v. Hill, 92 Wis. 188.

[281] Smith v. Hull Glass Co., 11 C. B. 897; Goodwin v. Union Screw Co., 34 N. H. 378, 1 Cum. Cas. 119; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121; Santa Clara Min. Ass'n v. Meredith, 49 Md. 400, 33 Am. Rep. 264; Badger v. Cumberland Bank, 26 Me. 428.

[282] Sherman v. Fitch, 98 Mass. 59, 1 Smith's Cas. 217; Goodwin v. Union Screw Co., 34 N. H. 378, 1 Cum. Cas. 119.

——**Ratification.**—A corporation may also, to the same extent as a natural person, adopt or ratify acts done or contracts made by a person as its agent without authority, and thereby render such acts or contracts binding upon it,[283] provided, of course, the act or contract is not *ultra vires*.[284]

§ 191. Power to assist in actions or proceedings.—A corporation has the power to assist others in prosecuting or defending an action or other legal proceeding if such action or proceeding will directly or indirectly affect its own rights or privileges, but not otherwise.

For a corporation to employ its funds in employing counsel, paying costs, or otherwise rendering assistance in the prosecution or defense of actions or other legal proceedings which do not affect its own rights or privileges, is clearly a diversion of its funds to a purpose which is foreign to the objects of its creation, and is *ultra vires*.[285] A corporation, however, is authorized to thus assist in prosecuting or defending an action or proceeding which directly or indirectly affects its own rights or privileges.[286] For example, it has been held that a railroad company cannot assist by paying costs in a criminal prosecution for libel instituted by its directors against a former officer or agent of the company,[287] and that a municipal corporation cannot assist by employing counsel in a criminal prosecution by the state against a former officer of the municipality.[288] On the other hand, it has been held that a religious society may assist by paying costs

[283] Smith v. Hull Glass Co., 11 C. B. 897; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121; Howe v. Keller, 27 Conn. 538; Sherman v. Fitch, 98 Mass. 59, 1 Smith's Cas. 217; White Water Valley Canal Co. v. Hawkins, 4 Ind. 474.

As to the ratification or adoption of contracts made by promoters, see ante, § 101(c).

[284] Ante, § 125.

[285] Butler v. City of Milwaukee, 15 Wis. 493; Pickering v. Stephenson, L. R. 14 Eq. 322; Kernaghan v. Williams, L. R. 6 Eq. 228.

[286] Harbison v. Hartford First Presbyterian Soc., 46 Conn. 529, 33 Am. Rep. 34; Babbitt v. Selectmen of Savoy, 3 Cush. (Mass.) 530; Baker v. Inhabitants of Windham, 13 Me. 74; City of Macon v. Cummins, 47 Ga. 321; Attorney General v. City of Norwich, 2 Mylne & C. 406; Breay v. Royal British Nurses' Ass'n [1897] 2 Ch. Div. 272; Holdsworth v. Borough of Clifton Dartmouth Hardness, 11 Adol. & El. 490.

[287] Pickering v. Stephenson, L. R. 14 Eq. 322.

[288] Butler v. City of Milwaukee, 15 Wis. 493.

in defending a suit to enjoin the sale of the pews in its church;[289] that a corporation engaged in the publication of a newspaper may assist in defending its editor against an action for libel based upon matter published in the paper;[290] and that a municipal corporation may assist in defending *quo warranto* proceedings against its members in which its corporate existence is attacked.[291]

§ 192. Mode of contracting—(a) In general.—Unless the charter of a corporation or some other statute requires it to contract in some particular form or manner, it may contract through its authorized agents in the same form and manner as a natural person may. It may contract under the corporate seal, or it may enter into a simple contract, or it may, by reason of the acts of its agents, incur an implied or quasi contractual obligation. But, as a rule, when the charter of a corporation or any other statute provides that it shall contract in a particular form or manner, and the provision is not merely directory, the requirement must be complied with.

(b) Contracts under seal.—A corporation may always contract under the corporate seal, so as to make the contract a deed or specialty.[292] Indeed, as we shall presently see, it was at one time held that it could not contract in any other way.[293]

(c) Execution and validity of deed.—In order that an instrument executed in the name of a corporation may be the deed of the corporation, the corporate seal must be properly affixed thereto. The seal affixed must be the seal of the corporation,—the seal adopted, regularly or for the occasion, as the corporate seal,[294]—and not merely the private seal of the officer or agent

[289] Harbison v. Hartford First Presbyterian Soc., 46 Conn. 529, 33 Am. Rep. 34.

[290] Breay v. Royal British Nurses' Ass'n [1897] 2 Ch. Div. 272.

[291] Attorney General v. City of Norwich, 2 Mylne & C. 406.

[292] Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Smith's Cas. 190, 1 Keener's Cas. 650, 1 Cum. Cas. 331. See ante, § 183.

[293] Infra, this section, (e).

[294] Danville Seminary v. Mott, 136 Ill. 289; Mott v. Danville Seminary, 129 Ill. 403; Bank of Metropolis v. Guttschlick, 14 Pet. (U. S.) 19; Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; Brinley v. Mann, 2 Cush. (Mass.) 337; Osborne v. Tunis, 25 N. J. Law, 633; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193. See Duke v. Mark-

executing the instrument;[295] and it must be affixed by an authorized officer or agent.[296] "The mere fact that a deed has the corporate seal attached, does not make it the act of the corporation, unless the seal was placed to it by some one duly authorized."[297] Authority to execute a deed for a corporation need not be conferred by an instrument under seal.[298] And a deed executed without authority may be rendered the binding deed of the corporation by ratification.[299]

If an instrument purports to have been executed by a corporation, and the corporate seal is affixed, it will be presumed that it was affixed by an authorized officer or agent, but the presumption may be rebutted by showing that it was not so affixed, and

ham, 105 N. C. 131, 18 Am. St. Rep. 889; Hatch v. Barr, 1 Ohio, 390; Eagle Woolen Mills Co. v. Monteith, 2 Or. 277.

Where, as in most states, a conveyance of land, or mortgage, is required to be under seal, an instrument purporting to convey land, and to have been executed by a corporation, but not under the corporate seal, is ineffectual. Allen v. Brown, 6 Kan. App. 704; Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454.

[295] Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; Bank of Metropolis v. Guttschlick, 14 Pet. (U. S.) 19; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Saxton v. Texas, Santa Fe & N. R. Co., 4 N. Mex. 378; Taft v. Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; Briniey v. Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; Mitchell v. St. Andrew's Bay Land Co., 4 Fla. 200; State v. Ailis, 18 Ark. 269.

When the officer executing a contract for a corporation uses his private seal instead of the corporate seal, the contract is binding on the corporation as a simple contract. Eureka Co. v. Bailey Co., 11 Wall. (U. S.) 488; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193.

A corporation may adopt the private seal of a person executing a deed as its agent as the corporate seal. See post, note 302.

[296] See the cases above cited. And see Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715; Hoyt v. Thompson, 5 N. Y. 320; Jackson v. Campbell, 5 Wend. (N. Y.) 572; People v. Deyoe, 2 Thomp. & C. (N. Y.) 142; Damon v. Inhabitants of Granby, 2 Pick. (Mass.) 353; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454.

[297] Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715.

[298] The common-law doctrine that authority on the part of an agent to contract under seal for his principal must be given by an instrument under seal does not apply to the appointment of an agent by a corporation to execute an intrument under seal. The mere vote of the corporators or directors, as the case may be, is sufficient. Howe v. Keeler, 27 Conn. 538; Hutchins v. Byrnes, 9 Gray (Mass.) 367; Hopkins v. Gallatin Turnpike Co., 4 Hump. (Tenn.) 403; Burr's Ex'r v. McDonald, 3 Grat. (Va.) 215.

[299] Howe v. Keeler, 27 Conn. 538. See ante, § 190(b).

in such a case the instrument is not the deed of the corporation.[300]

The seal need not necessarily be affixed to the deed by the hand of the officer executing it, but it may be affixed by his direction. Thus, it was held sufficient when a *fac simile* of the seal of a corporation was impressed by the printer upon bonds to be issued by the corporation, by direction of the officers of the corporation, and the officers subsequently signed and issued the bonds.[301]

In the absence of a charter or statutory provision to the contrary, a corporation, like an individual, may adopt any seal which is convenient for the occasion, and may alter or renew the same at pleasure.[302] Formerly a seal was affixed to a deed

[300] Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715. And see Hoyt v. Thompson, 5 N. Y. 320; Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Bliss v. Kaweah Canal & Irrigation Co., 65 Cal. 502; Gorder v. Plattsmouth Canning Co., 36 Neb. 548; Yanish v. Pioneer Fuel Co., 64 Minn. 175; Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454.

[301] Royal Bank of Liverpool v. Grand Junction Railroad & Depot Co., 100 Mass. 444, 1 Cum. Cas. 131. In this case the corporate seal was affixed to the bonds by the printer so as to indent the paper. Judge Foster said: "The corporate seal having been affixed by the printer, by the direction of the officers of the corporation; and they having adopted his act, and subsequently signed and issued the bonds; the sealing was duly made, and the instruments became obligatory upon the corporation. This is no more nor less than constantly takes place when a scrivener prepares and affixes a seal to a deed which the grantor thereupon signs and delivers. The practice is of unquestionable validity, and the authorities for it are abundant. 'If a stranger seal an instrument by the allowance, or the commandment precedent, or agreement subsequent, of the person who is to seal it, that is sufficient.'" Citing Cruise Dig. tit. 32, c. 2, § 55.

[302] Danville Seminary v. Mott, 136 Ill. 289. And see Eureka Co. v. Bailey Co., 11 Wall. (U. S.) 488, 491; Tenney v. East Warren Lumber Co., 43 N. H. 343; Johnston v. Crawley, 25 Ga. 316; Ransom v. Stonington Sav. Bank, 13 N. J. Eq. 212; Stebbins v. Merritt, 10 Cush. (Mass.) 27; Taylor v. Heggie, 83 N. C. 244; Bank of Middlebury v. Rutland & Washington R. Co., 30 Vt. 159; Crossman v. Hilltown Turnpike Co., 3 Grant's Cas. (Pa.) 225; Board of Directors of Alfalfa Irrigation Dist. v. Collins, 46 Neb. 411; Sarmiento v. Davis Boat & Oar Co., 105 Mich. 300; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Albany South Baptist Society v. Clapp, 18 Barb. (N. Y.) 35; St. Phillip's Church v. Zion Presbyterian Church, 23 S. C. 297.

Where a seal which had not been formally adopted by a corporation was used for the first time in the execution of instruments which afterwards came in question, it was held that a finding that it had become the common seal of the corporation by use was sustained by proof that it had afterwards been used as the corporate seal

by making an impression on wax, but this is no longer necessary. It may be affixed by making an impression, intended as a seal, on the paper itself on which the deed is written, or on a wafer attached to the paper.[303] In some jurisdictions an impression is necessary, and a *fac simile* of the corporate seal merely written or printed on the paper is not enough,[304] while

in all transactions requiring its seal. Blood v. La Serena Land & Water Co., 113 Cal. 221.

It is an inseparable incident of every corporation, it was said in a New Jersey case, not only that it may have a corporate seal, but also that it may make, alter, and renew the same at pleasure. Ransom v. Stonington Sav. Bank, 13 N. J. Eq. 212.

If a corporation has not adopted a regular seal, and if there is no charter or statutory provision to the contrary, the individual seal or seals of the officers or agents executing a deed on behalf of a corporation may be adopted by it as the corporate seal. Reynolds v. Trustees of Glasgow Academy, 6 Dana (Ky.) 37; Tenney v. East Warren Lumber Co., 43 N. H. 343; Albany South Baptist Soc. v. Clapp, 18 Barb. (N. Y.) 35; Taylor v. Heggie, 83 N. C. 244; Jackson v. Walsh, 3 Johns. (N. Y.) 226; Wiley v. Board of Education of Minneapolis, 11 Minn. 371; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

It has been held that, although a corporation may have adopted a particular seal, a deed sealed with any other seal, if it is adopted by the corporation for the occasion, is valid. Tenney v. East Warren Lumber Co., 43 N. H. 343.

The fact that a seal with a particular device has been used by a corporation on several occasions does not make it the exclusive seal of the corporation, if no particular seal has ever been adopted by vote of the company. Stebbins v. Merritt, 10 Cush. (Mass.) 27.

Where, under the law of the particular state, the board of directors only can alter the common seal of a corporation, and adopt a new one, the scroll or private seal of an officer of a corporation affixed to a contract is not the seal of the company. Saxton v. Texas, Santa Fe & N. R. Co., 4 N. Mex. 378.

[303] Royal Bank of Liverpool v. Grand Junction Railroad & Depot Co., 100 Mass. 444, 1 Cum. Cas. 131. And see Warren v. Lynch, 5 Johns. (N. Y.) 239; Farmers' & Manufacturers' Bank v. Haight, 3 Hill (N. Y.) 493; Tasker v. Bartlett, 5 Cush. (Mass.) 359; Hendee v. Pinkerton, 14 Allen (Mass.) 381, 1 Keener's Cas. 653, 1 Cum. Cas. 336; Corrigan v. Trenton Delaware Falls Co., 5 N. J. Eq. 52; Pierce v. Indseth, 106 U. S. 546.

A statute providing generally that a seal shall include impressions on the paper itself, as well as impressions on wax or wafers, applies to seals of corporations as well as to seals of individuals. Johnston v. Crawley, 25 Ga. 316, 71 Am. Dec. 173.

A statutory provision that the mere impression of the seal of a corporation upon any legal instrument executed by the corporation shall be valid does not operate retrospectively. Bates v. Boston & New York Cent. R. Co., 10 Allen (Mass.) 251.

[304] Bates v. Boston & New York Cent. R. Co., 10 Allen (Mass.) 251. And see Hendee v. Pinkerton, 14 Allen (Mass.) 381, 1 Keener's Cas. 653, 1 Cum. Cas. 336; McCarthy v. Metropolitan Life Ins. Co., 162 Mass. 254; Mitchell v. Union Life Ins. Co., 45 Me. 104, 71 Am. Dec. 529.

Compare Royal Bank of Liver-

in other jurisdictions, either by express statutory provision or by judicial decision, a written or printed *fac simile* of the corporate seal or a scroll is sufficient, if adopted and intended as the seal of the corporation when the instrument is executed.[305]

If the question whether what purports to be a seal on an instrument purporting to have been executed by a private corporation is in issue, it must be proven that it is the corporate seal, or that it was adopted as the seal of the corporation for the occasion. The seal of a private corporation, it has been said, is not evidence of its own authenticity.[306] But it has been held that, in the absence of evidence to the contrary, a scroll or rectangle, containing the word "Seal," when placed opposite the name of a corporation, will be presumed to be its proper and common seal.[307] The affixing of a corporate seal need not

pool v. Grand Junction Railroad & Depot Co., 100 Mass. 444, 97 Am. Dec. 115.

[305] See Lee v. Adkins, 1 Minor (Ala.) 187; Bertrand v. Byrd, 4 Ark. 195; Hacker's Appeal, 121 Pa. St. 192; Reynolds v. Trustees of Glasgow Academy, 6 Dana (Ky.) 37; Sarmiento v. Davis Boat & Oar Co., 105 Mich. 300; Jacksonville, Mayport & P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514.

A statute providing that corporations "may have a common seal" is merely declaratory of the common law, and does not require it to adopt a fixed seal, so as to prevent it from executing a bond with a scroll for the seal. Sarmiento v. Davis Boat & Oar Co., 105 Mich. 300.

[306] See Tours v. Vreelandt, 7 N. J. Law, 352, 11 Am. Dec. 551; Jackson v. Pratt, 10 Johns. (N. Y.) 381; Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 257; Foster v. Shaw, 7 Serg. & R. (Pa.) 156; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Chew v. Keck, 4 Rawle (Pa.) 163; Farmers' & Mechanics' Turnpike Co. v. McCullough, 25 Pa. St. 303.

Contra, Trustees of Canandaigua Academy v. McKechnie, 19 Hun (N. Y.) 62.

[307] Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514. See, also, Reynolds v. Trustees of Glasgow Academy, 6 Dana (Ky.) 37; Woodman v. York & Cumberland R. Co., 50 Me. 549; Susquehanna Bridge & Bank Co. v. General Ins. Co., 3 Md. 305, 56 Am. Dec. 740; Tenney v. East Warren Lumber Co., 43 N. H. 343; Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454.

Under a statute declaring that a scroll affixed to an instrument in lieu of a seal should have the same force as a seal, it was held that, in a deed by a corporation executed by its directors, a scroll attached to the name of each director would be deemed the seal of the corporation, in the absence of proof that it had a regular seal, or that the scrolls were intended as the individual seals of the directors. Reynolds v. Glasgow Academy, 6 Dana (Ky.) 37. See, also, Phillips v. Coffee, 17 Ill. 154, 63 Am. Dec. 357.

An instrument purporting to have been executed by a corporation, and reciting that it is sealed with the seal of the corporation, raises a presumption that what purports to be a seal placed after the names of the officers signing the same is the corporate seal.

be proved by a witness who saw it affixed.[308] The identity of a corporate seal may be proved by a witness who is acquainted with its impression.[309]

(d) Effect of seal.—At common law a sealed instrument conclusively imports a consideration, and in a Massachusetts case it was said that this principle would allow the holder of bonds executed and delivered by a corporation to recover thereon, although they were delivered gratuitously.[310] This view, however, cannot be sustained unless the action is by a *bona fide* purchaser for value and without notice, since the delivery of its bond by a corporation without any consideration is *ultra vires,* and payment thereof would be a misapplication of its funds.[311] The fact that a contract by a corporation is under seal cannot prevent the corporation from showing that it is *ultra vires,* if the circumstances are such that the defense of *ultra vires* is available. A seal does not raise a presumption of a consideration, but (at common law) merely dispenses with the necessity for any consideration; nor does it exclude evidence that a contract is illegal. It should not, therefore, be held to exclude evidence that the contract is *ultra vires.*

It was said by Lord Campbell in an English case: "Suppose that the directors of a railway company should purchase a thousand gross of green spectacles, as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known to the covenantee; and, he being *in pari delicto,* I conceive that the maxim would apply *potior est conditio possidentis.* This would be an illegal contract to misapply the funds of the company; and the illegality might be set up as a defense. So, if, without any consideration whatever, the directors of a rail-

Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454.

[308] Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313.

[309] City Council v. Moorhead, 2 Rich. (S. C.) 430.

[310] Foster, J., in Royal Bank of Liverpool v. Grand Junction Railroad & Depot Co., 100 Mass. 444, 1 Cum. Cas. 131, 1 Smith's Cas. 220. See, also, Sturtevants v. City of Alton, 3 McLean, 395, Fed. Cas. No. 13,580.

[311] Ante, §§ 159(f), 183(e).

way company were to put the company's seal to a deed covenanting to pay a mere stranger 1000 l., this would be *ultra vires,* to the knowledge of the covenantee, and he could not maintain an action to recover the 1000 l. from the funds of the company in fraud of the shareholders. * * * It has been contended, I am aware, that the deeds of such companies are to be treated like the deeds of individuals or of common partnerships. But there seems to be an essential distinction between them. The individual may do what he likes with his own; and he may bind himself by a deed disposing of his property, however, capriciously, and without any consideration, so that no fraud has been practiced upon him. In such a case, want of consideration is immaterial; no one is injured; and there is no illegality to be pleaded."[312]

(e) Simple contracts.—Under the early common law it was considered that corporations aggregate, being invisible bodies, could not manifest their intention by any personal act or oral discourse, but must act and speak by their corporate seal, and it was therefore held that they could not contract except under the corporate seal. "Though the particular members," said Blackstone, "may express their private consent to any acts, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."[313] Afterwards the rule was gradually relaxed, from reasons of necessity or convenience, so as to allow corporations to contract through their agents and without the use of the corporate seal in matters of little importance or frequent occurrence, and in matters within their ordinary business, as the retaining of an inferior servant, the drawing and accepting of bills of exchange by a trading corporation, the purchase and sale of goods by such a corporation, etc.[314] Except in these cases the general

[312] City of Norwich v. Norfolk Ry. Co., 4 El. & Bl. 443, 1 Smith's Cas. 220.

[313] 1 Bl. Com. 475.

[314] Church v. Imperial Gas Light & Coke Co., 6 Adol. & El. 846; Diggle v. London & Blackwall Ry. Co., 5 Exch. 442, 450; Beverley v.

rule in England continued to be, and is now, that corporations must contract under their corporate seal.[315]

In some of the early cases the English doctrine as to the necessity for the use of the corporate seal in contracts by corporations was recognized in the United States;[316] but it has long since been abandoned, and the rule is now well settled that, in the absence of charter or statutory provisions to the contrary, a corporation may appoint an agent without the use of its seal,[317] and may, acting by such agent, enter into a simple contract in writing or an oral contract, provided the subject-matter of the contract is within its powers, whenever a natural person could enter into such a contract. In other words, any contract whatever, within the powers of a corporation, if it can be made by a natural person without a seal, may be so made by the corporation, unless a seal is expressly required by the charter of the corporation or some other statute.[318]

Lincoln Gas Light & Coke Co., 6 Adol. & El. 829.

[315] East London Water Works Co. v. Bailey, 4 Bing. 283, 1 Keener's Cas. 501; Paine v. Strand Union Guardians of the Poor, 8 Q. B. 326; Diggle v. London & Blackwall Ry. Co., 5 Exch. 442.

So, also, in Canada. Garland Mfg. Co. v. Northumberland Paper & Electric Co., 31 Ont. 40.

[316] See Garrison v. Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; Kennedy v. Baltimore Ins. Co., 3 Har. & J. (Md.) 367, 6 Am. Dec. 499.

[317] Ante, § 190(b).

[318] Bank of Columbia v. Patterson's Adm'r, 7 Cranch (U. S.) 299, 1 Smith's Cas. 213, 1 Keener's Cas. 496, 1 Cum. Cas. 112; Crawford v. Longstreet, 43 N. J. Law, 325, 1 Keener's Cas. 545; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121.

And see Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338; Gottfried v. Miller, 104 U. S. 527; Everett v. United States, 6 Port. (Ala.) 166, 30 Am. Dec. 584; McCullough v. Talladega Ins. Co., 46 Ala. 376; Savings Bank of New Haven v. Davis, 8 Conn. 191; Ryan v. Dunlap, 17 Ill. 40, 63 Am. Dec. 334; Racine & Mississippi R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331, 95 Am. Dec. 595; B. S. Green Co. v. Blodgett, 159 Ill. 169; Trustees of Wolcott Christian Church v. Johnson, 53 Ind. 273; Muscatine Water Co. v. Muscatine Lumber Co., 85 Iowa, 112, 39 Am. St. Rep. 284; Commercial Bank of New Orleans v. Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.) 448; Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Buckley v. Briggs, 30 Mo. 452; Goodwin v. Union Screw Co., 34 N. H. 378, 1 Cum. Cas. 119; Trustees of Antipoeda Baptist Church v. Mulford, 8 N. J. Law, 185; Moss v. Averell, 10 N. Y. 449; Randall v. VanVechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Hoag v. Lamont, 60 N. Y. 96; Whitford v. Laidler, 94 N. Y. 145; Leinkauf v. Calman, 110 N. Y. 50; Hamilton v. Lycoming Mut. Ins. Co., 5 Pa. St. 339; Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4

"The technical doctrine," said Mr. Justice Story in a leading case in the supreme court of the United States, "that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purpose of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which, an action may well lie."[319]

(f) Implied and quasi contracts.—As was said by Mr. Justice Story in the case above referred to, all duties imposed upon corporations by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. In other words, a corporation, like a natural person, may incur implied and *quasi* contractual obligations,—as for services rendered or other benefits conferred at its request, for money had and received by it for the use of another, for money paid to its use, etc. This doctrine is well settled both in England[320] and in the United States.[321] We shall see in another section that contracts implied by law or *quasi* contracts are not within

Serg. & R. (Pa.) 16; Hand v. Clearfield Coal Co., 143 Pa. St. 408; Grubbs v. National Life Maturity Ins. Co., 94 Va. 589; Ford v. Hill, 92 Wis. 188; Winterfield v. Cream City Brewing Co., 96 Wis. 239; Speirs v. Union Drop Forge Co., 174 Mass. 175; Cahill v. Maryland Life Ins. Co., 90 Md. 333; Western Homestead & Irrigation Co. v. First Nat. Bank of Albuquerque, 9 N. M. 1.

[319] Bank of Columbia v. Patterson's Adm'r, 7 Cranch (U. S.) 299, 306, 1 Smith's Cas. 213, 1 Keener's Cas. 496, 1 Cum. Cas. 112.

[320] Beverley v. Lincoln Gas Light & Coke Co., 6 Adol. & El. 829; East London Water Works Co. v. Bailey, 4 Bing. 283, 1 Keener's Cas. 501.

[321] Bank of Columbia v. Patterson's Adm'r, 7 Cranch (U. S.) 299, 1 Smith's Cas. 213, 1 Keener's Cas. 496, 1 Cum. Cas. 112; Goodwin v. Union Screw Co., 34 N. H. 378, 1 Cum. Cas. 119; Day v. Spiral Springs Buggy Co., 57 Mich. 146,

a charter or statutory requirement that the contracts of a corporation shall be entered into in a certain manner or form, or by certain officers.[322]

(g) Express charter or statutory requirements—(1) In general.—If the charter of a corporation, or any statute which is applicable to it, provides that it shall enter into contracts in any particular manner, or with certain formalities, and the provision is mandatory and not merely directory,[323] the provision must be complied with, for the legislature, in giving a corporation the power to contract, may prescribe the manner in which the power shall be exercised.[324] A corporation, said Chief Justice Marshall, "may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes."[325]

(2) Requirement of seal.—If the charter of a corporation or any other statute requires contracts or conveyances by the corporation, or particular contracts, to be under the corporate seal, the seal is necessary.[326]

58 Am. Rep. 352, 1 Keener's Cas. 762, 1 Cum. Cas. 261; White v. Franklin Bank, 22 Pick. (Mass.) 181, 1 Keener's Cas. 749.

And see Logan County Nat. Bank v. Townsend, 139 U. S. 67; Philadelphia Loan Co. v. Towner, 13 Conn. 249; Gowen Marble Co. v. Tarrant, 73 Ill. 608; Town of New Athens v. Thomas, 82 Ill. 259; Underwood v. Newport Lyceum, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260; President, etc., of Maryland Hospital v. Foreman, 29 Md. 524; Hayden v. Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143; Cicotte v. St. Anne's Catholic, A. & R. Church, 60 Mich. 552; Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Danforth v. Schoharie & Duanesburg Turnpike Road, 12 Johns. (N. Y.) 227; Oneida Bank v. Ontario Bank, 21 N. Y. 490.

A corporation may hold as tenant from year to year. Crawford v. Longstreet, 43 N. J. Law, 325, 1 Keener's Cas. 545. But see Garland Mfg. Co. v. Northumberland Paper & Electric Co., 31 Ont. (Can.) 40.

[322] Post, § 192 (g)(6).

[323] See post, § 192 (g)(5).

[324] Homersham v. Wolverhampton Waterworks Co., 6 Exch. 137; Head v. Providence Ins. Co., 2 Cranch (U. S.) 127; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121; Couch v. City Fire Ins. Co., 38 Conn. 181, 9 Am. Rep. 375; Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 1 Smith's Cas. 298; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

[325] Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 167.

[326] Frend v. Dennett, 4 C. B. (N. S.) 576, 27 Law J. C. P. 314; Crampton v. Varna Ry. Co., 7 Ch. App. 562; Lindauer v. Delaware Mutual Safety Ins. Co., 13

——(3) **Requirement of writing.**—And when the charter of a corporation requires its contracts to be in writing, an oral contract, at least so long as it is executory, is not binding upon it.[327] The mere fact, however, that the charter of a corporation refers to the contracts to be made by the corporation as written is not necessarily equivalent to a requirement of writing. Thus, where the charter of a fire insurance company declared its object to be the making of insurance "by instrument, under seal or otherwise," and provided that certain officers should be authorized to make contracts of insurance in the name and behalf of the company, "and in and by policy of insurance in writing to be signed by the president," etc., it was held that written policies were mentioned merely because they were usual, and that there was no intention to prohibit the company from making an oral contract of insurance.[328]

——(4) **Requirement that contracts be made or signed by particular officers.**—When the charter of a corporation provides that contracts on behalf of the corporation shall be made by certain officers, or by a certain number of officers, and the provision is not merely directory, contracts made by other officers, or by less than the prescribed number, will not be binding.[329] Generally, however, such provisions are merely directory.[330]

——(5) **Provisions which are merely directory, or for the protection of stockholders.**—Provisions in the charter of a corporation as to the form and mode of entering into contracts are often intended by the legislature, not as limita-

Ark. 461; Allen v. Brown, 6 Kan. App. 704. And see supra, this section, (c).

[327] Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121; Curtis v. Piedmont Lumber & Min. Co., 109 N. C. 403; Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 1 Smith's Cas. 218; Clowe v. Imperial Pine Product Co., 114 N. C. 304; Foulke v. San Diego & Gila Southern Pac. R. Co., 51 Cal. 365.

A requirement in the charter or articles of a corporation that contracts involving liabilities for the payment of money shall be in writing does not apply to an acceptance by the corporation of an order for the payment of money due under a written contract. French Spiral Spring Co. v. New England Car Trust, 32 Fed. 44.

[328] Relief Fire Ins. Co. of New York v. Shaw, 94 U. S. 574.

[329] Homersham v. Wolverhampton Waterworks Co., 6 Exch. 137; Couch v. City Fire Ins. Co., 38 Conn. 181, 9 Am. Rep. 375; Manderson v. Commercial Bank, 28 Pa. St. 379.

[330] See the section following.

tions upon the power of the corporation, but merely as directory to the officers of the corporation; and, when this is the case, contracts made by the corporation without compliance with such provisions are binding upon it. No fixed or definite rule can be laid down for determining whether a provision is directory or not. The question depends upon the intention of the legislature, to be ascertained in each case, not only from the language of the provision, but also from its nature and object.

Particular provisions.—Where the charter of a fire insurance company provided that a policy issued by it on property on which there was other insurance should be void in the absence of consent of the company indorsed upon the policy under the hand of the secretary, it was held that the provision was mandatory, and that it could not be waived by the company by giving its consent in any other way.[331] A requirement that contracts shall be in writing is generally mandatory.[332]

On the other hand, where the charter or deed of settlement of an insurance company provided that the seal of the corporation should not be affixed to any policy except by the order of three directors signed by them and countersigned by the manager, it was held that the provision was merely directory, and that a policy to which the corporate seal was affixed without such an order was valid.[333] A like construction was placed upon a provision in the charter of a corporation that the bond of its cashier should be accepted by the directors.[334] And it has repeatedly been held that provisions in the charters of insurance companies and other corporations that policies, securities, or other contracts issued or made by them shall be signed, or signed and countersigned, by particular officers, are merely directory, and do not prevent contracts by other officers or agents, and oral contracts.[335] Where the charter of a corporation provided that, before certain contracts should be made by the

[331] Couch v. City Fire Ins. Co., 38 Conn. 181, 9 Am. Rep. 375.

[332] Curtis v. Piedmont Lumber & Min. Co., 109 N. C. 403; and see note 327, supra.

[333] Prince of Wales Life & Educational Assur. Co. v. Harding, El., Bl. & El. 183.

[334] Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64.

[335] In re Norwich Yarn Co., 22 Beav. 143; New England Fire &

corporation, the consent of the stockholders, or a certain proportion of them, should be obtained, or that notice should be given them, it was held that the provision was intended merely for their protection, and might be waived by them, and that it did not affect the powers of the corporation.[336]

—(6) **Implied or quasi contracts.**—A provision in the charter of a corporation that its contracts shall be entered into in a certain manner or form, or by certain officers, applies only to express contracts. It has no application to *quasi* contracts, or contracts implied by law because of benefits conferred, money had and received, or money paid to the use of another, etc.[337]

—(7) **Executed contracts.**—It has also been held that such a provision does not apply to contracts which are within the powers of a corporation, and which have been executed by the other party, so that the corporation has received the consideration. Thus, in a California case, where a corporation orally employed an attorney to defend an action, and the attorney successfully performed the contract on his part, it was held that he could maintain an action to recover his compensation under

Marine Ins. Co. v. Robinson, 25 Ind. 536; Barnes v. Ontario Bank, 19 N. Y. 152; Dana v. Bank of St. Paul, 4 Minn. 385. Compare the cases in note 329, supra.

Where the charter of an insurance company gave it the power "generally to do and perform all things relative to the object of the association," and provided in a subsequent section that "all policies or contracts of insurance" should be subscribed by the president or some other officer designated by the board of directors for that purpose, it was held that the latter provision did not prevent the company from binding itself by contracts for policies and immediate insurance executed in other modes, and by other officers or agents, but merely prescribed the manner of executing the final contract or policy. Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

[336] Nelson v. Hubbard, 96 Ala. 238; Beecher v. Marquette & Pacific Rolling Mill Co., 45 Mich. 103.

A statute authorizing a corporation to borrow money on consent of the association, expressed by a vote of a majority of its members, does not require that its records shall expressly show that a majority voted to authorize a loan, in order to bind the corporation. Where its records show that the money was received by its treasurer, and applied to corporate uses by the board of trustees, whose acts were approved by the corporation, compliance with the statute is shown. Illinois Conference of Evangelical Ass'n v. Plagge, 177 Ill. 431.

[337] Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. (U. S.) 326; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121; Carey v. McDougald, 7 Ga. 84; Roberts

the contract notwithstanding the charter of the corporation provided that no contract should be binding on the corporation unless in writing.[338]

—(8) **Provisions not applicable to contracts in course of ordinary business.**—It may also appear from the nature of the business of a corporation and other circumstances that a provision in its charter as to the mode of entering into contracts, even though general in its terms, was not intended to apply to such contracts as are made by the corporation in the course of its ordinary business. Thus, in a Georgia case, where the charter of a bank provided that all contracts should be signed by its president and countersigned by its cashier, it was held that the provision did not apply to such dealings and transactions as are usually and necessarily performed by the cashier alone, or some other agent.[339]

v. P. A. Deming Woodworking Co., 111 N. C. 432, 1 Smith's Cas. 218; Northern Bank of Kentucky v. Johnson, 5 Cold. (Tenn.) 88.

[338] Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121. See, also, Fister v. La Rue, 15 Barb. (N. Y.) 323; Curtis v. Piedmont Lumber & Min. Co., 109 N. C. 403; Clowe v. Imperial Pine Product Co., 114 N. C. 304.

The fact that a contract not in the form prescribed by the charter of a corporation has been partly performed does not entitle the other party to recover damages for the corporation's failure to perform the residue. Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 1 Smith's Cas. 218.

[339] Carey v. McDougald, 7 Ga. 84. And see Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. (U. S.) 326; Merchants' Bank of Macon v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Rockwell v. Elkhorn Bank, 13 Wis. 653.

CHAPTER XI.

POWER TO TAKE AND HOLD STOCK.

I. Power to Take and Hold Stock in Another Corporation.

§ 193. In general.
194. Express or implied authority to take stock.
(a) In general.
(b) Taking stock as collateral.
(c) Taking stock in payment of debts.
(d) Taking stock to effect compromise.
(e) Taking stock in payment on sale of property.
195. Presumption of authority.
196. Speculating in stock.
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198. Rights and liabilities with respect to shares.

II. Power of a Corporation to Take and Hold its Own Stock.

§ 199. In general.
200. Fraud or prejudice to stockholders or creditors.
201. Taking stock as collateral.
202. Taking stock in payment of debts.
203. Taking stock to effect compromise.

I. Power to Take and Hold Stock in Another Corporation.

§ 193. In general.—A corporation has no power to subscribe for or purchase shares of stock in another corporation, unless such power is expressly granted, or unless the nature of the corporation and the circumstances under which the stock is acquired are such as to render the transaction a necessary or reasonable means of carrying out the object for which it was created, or of accomplishing some purpose which is authorized by its charter.

In England it seems to be settled that a corporation, unless expressly prohibited, has the power to purchase and hold shares of stock in other corporations, provided the transaction is not inconsistent with its nature or object, and provided the shares

are not acquired for an improper purpose. It has been so held in the case of ordinary banking and trading companies,[1] and in the case of a corporation organized for the purpose of "undertaking, assisting, and participating in financial, commercial, and industrial operations and undertakings * * * both singly and in connection with other persons, firms, companies, and corporations."[2]

In the United States there are some cases to the same effect,[3] but they are opposed to the decided weight of authority both in the federal and state courts. The prevailing doctrine is that a corporation has no power either to subscribe for or purchase shares of stock in another corporation, unless such power is expressly conferred upon it by its charter, or unless the circumstances are such that the transaction is a necessary or reasonable means of carrying out or accomplishing the objects for which it was created.[4]

[1] In re Asiatic Banking Corp., 4 Ch. App. 252, 1 Cum. Cas. 359; In re Barned's Banking Co., 3 Ch. App. 105.

Compare, however, Joint Stock Discount Co. v. Brown, L. R. 3 Eq. 139, 2 Smith's Cas. 958; Great Eastern Ry. Co. v. Turner, 8 Ch. App. 149; In re European Society Arbitration Acts, 8 Ch. Div. 704

[2] In re Financial Corporation, 28 Wkly. Rep. 760.

"A corporation may deal in the shares of other corporations, without express power so to do, provided the nature of its business be such as to render such transactions conducive to its prosperity." Green's Brice, Ultra Vires, 91.

[3] Booth v. Robinson, 55 Md. 419 (where it was held that one steamboat company could buy stock in another such company); White v. G. W. Marquardt & Son, 105 Iowa, 145 (where it was held that a trading company could sell its goods for stock in another corporation). And see Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa, 147; Latimer v. Citizens' State Bank, 102 Iowa, 162.

[4] Central R. Co. v. Collins, 40 Ga. 582, 1 Keener's Cas. 706; First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 1 Keener's Cas. 717, 1 Cum. Cas. 368; Citizens' State Bank of Noblesville v. Hawkins, 34 U. S. App. 423, 71 Fed. 369, 1 Keener's Cas. 735; California Bank v. Kennedy, 167 U. S. 362, 1 Keener's Cas. 737; Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Keener's Cas. 504, 1 Cum. Cas. 343; Milbank v. New York, Lake Erie & W. R. Co., 64 How. Pr. (N. Y.) 20, 1 Cum. Cas. 353, 2 Smith's Cas. 963; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14, 1 Keener's Cas. 781, 1 Cum. Cas. 293, 1 Smith's Cas. 497; Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 255, 38 Am. Rep. 594, 1 Cum. Cas. 348; Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 1 Keener's Cas. 815; Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71, 1 Keener's Cas. 794.

See, also, Pauly v. Coronado Beach Co., 56 Fed. 428; Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County, 99 Ala.

"Were this not so," said the Ohio court, "one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the bank's stock."[5]

When a corporation has no power to subscribe for or purchase stock in another corporation, it cannot do so indirectly through a trustee or agent.[6]

Particular corporations.—This rule has been applied to various kinds of corporations. Thus, it has been held that a corporation created for the purpose of manufacturing iron cannot subscribe for stock in a railroad company, though the construction and operation of the railroad will enable it to obtain cheaper coal for use in its business;[7] and that a corporation created for the purpose of docking and repairing steamships cannot subscribe

1, 42 Am. St. Rep. 17; Memphis & Charleston R. Co. v. Woods, 88 Ala. 630, 16 Am. St. Rep. 81; Mechanics' & Working Men's Mut. Sav. Bank & Bldg. Ass'n v. Meriden Agency Co., 24 Conn. 159; Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336; Hazlehurst v. Savannah, Griffin & R. Co., 43 Ga. 57; People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319, 2 Smith's Cas. 952; New Orleans, F. & H. Steamship Co. v. Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90; Bank of Commerce v. Hart, 37 Neb. 197, 40 Am. St. Rep. 479; Pearson v. Concord R. Co., 62 N. H. 537; Denny Hotel Co. v. Schram, 6 Wash. 134, 36 Am. St. Rep. 137; De La Vergre Refrigerating Machine Co. v. German Savings Inst., 175 U. S. 40; Easun v. Buckeye Brewing Co., 51 Fed. 156; Military Interstate Ass'n v. Savannah, Thunderbolt & I. of H. Ry. Co., 105 Ga. 420; People v. Pullman's Palace Car Co., 175 Ill. 125; Martin v. Ohio Stove Co., 78 Ill. App. 105; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135; Elkins v. Camden & Atlantic R. Co., 36 N. J. Eq. 5, 1 Keener's Cas. 722.

See the extensive note on this subject in 36 Am. St. Rep. 133-142.

[5] Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 38 Am. Rep. 594, 1 Cum. Cas. 348. See, to the same effect, Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 228 Am. Rep. 9, 1 Keener's Cas. 504, 1 Cum. Cas. 343.

[6] Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; Nassau Bank v. Jones, 95 N. Y. 115, 1 Keener's Cas. 781, 1 Smith's Cas. 497, 1 Cum. Cas. 293.

[7] Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 1 Keener's Cas. 815.

for stock in a corporation created for the purpose of owning and navigating steamships.[8]

The rule has also been applied to subscriptions to or purchases of shares in a telegraph company by a lumber company;[9] in a banking company by a manufacturing or trading company,[10] and *vice versa;*[11] in a railroad company by another railroad company,[12] or by a banking company;[13] in a hotel company by a corporation created for the purpose of manufacturing and dealing in furniture;[14] in an insurance company by a banking company,[15] or by another insurance company;[16] in one manufacturing company by another manufacturing company,[17] or by a land or town-site company;[18] in one gas company by another gas company;[19] or in one mining company by another,[20] or one banking company by another,[21] or by an in-

[8] New Orleans, F. & H. Steamship Co. v. Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90.

[9] Peshtigo Co. v. Great Western Tel. Co. 50 Ill. App. 624.

[10] Summer v. Marcy, 3 Woodb. & M. 105, Fed. Cas. No. 13,609. And see Mechanics' & Working Men's Mut. Sav. Bank & Bldg. Ass'n v. Meriden Agency Co., 24 Conn. 159.

[11] Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Keener's Cas. 504, 1 Cas. 343.

[12] Central R. Co. v. Collins, 40 Ga. 582, 1 Keener's Cas. 706; Milbank v. New York, Lake Erie & W. R. Co., 64 How. Pr. (N. Y.) 20, 1 Cum. Cas. 353, 2 Smith's Cas. 963; Pearson v. Concord R. Co., 62 N. H. 537.

[13] Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14, 1 Keener's Cas. 781, 1 Cum. Cas. 293, 1 Smith's Cas. 497.

[14] Knowles v. Sandercock, 107 Cal. 629, 2 Smith's Cas. 971; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135.

[15] Bank of Commerce v. Hart, 37 Neb. 197, 40 Am. St. Rep. 479.

A corporation, however, may become a member of a mutual insurance company for the purpose of obtaining insurance. Note 24, infra.

[16] Berry v. Yates, 24 Barb. (N. Y.) 199.

A corporation organized for the purpose of doing a general insurance agency, commission, and brokerage business cannot subscribe for stock in a building and loan association. Mechanics' & Working Men's Mutual Savings Bank & Building Ass'n v. Meriden Agency Co., 24 Conn. 159.

[17] Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71, 1 Keener's Cas. 794; McCutcheon v. Merz Capsule Co., 37 U. S. App. 586, 71 Fed. 787; Martin v. Ohio Stove Co., 78 Ill. App. 105.

[18] Pauly v. Coronado Beach Co., 56 Fed. 428.

[19] People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319, 2 Smith's Cas. 952.

[20] McMillan v. Carson Hill Union Min. Co., 12 Phila. (Pa.) 404.

[21] Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 350, 38 Am. Rep. 594, 1 Cum. Cas. 348.

surance company.[22] Many of the cases above referred to show that the application of the rule is not affected by the fact that the corporations are of the same character or have the same object.*

§ 194. Express or implied authority to take stock.

(a) In general.—The general rule that a corporation cannot subscribe for or purchase stock in another corporation is based upon the ground that such a transaction is generally foreign to the objects of its creation, and not upon any notion that the nature of a corporation renders it incapable of taking and holding stock in other corporations. A corporation, therefore, may take and hold stock in another corporation whenever it is expressly authorized to do so.[23] And it may do so without ex-

[22] Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County, 99 Ala. 1, 42 Am. St. Rep. 17.

* See notes 12, 16, 17, 19, 20, 21, supra.

[23] See Market St. Ry. Co. v. Hellman, 109 Cal. 571; Zabriskie v. Cleveland, Columbus & C. R. Co., 23 How. (U. S.) 381; Oelbermann v. New York & Northern Ry. Co., 77 Hun (N. Y.) 332, 7 Misc. Rep. 352; Trust Co. of Georgia v. State (Ga.) 35 S. E. 223.

A statute providing that any "person" or any "two or more persons" may form a corporation, etc., does not authorize a corporation to become a subscriber for shares in another corporation. The word "person" in such a statute refers to natural persons only, in their individual capacity. Denny Hotel Co. v. Schram, 6 Wash. 134, 36 Am. St. Rep. 130.

A grant to an insurance company of the power to invest its money "in real or personal property, stocks or choses in action," gives it no authority to invest its capital by subscribing for stock of another corporation. Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County, 99 Ala. 1, 42 Am. St. Rep. 17.

A statute making it lawful for a manufacturing company to hold the stock of any corporation engaged in the business of mining, manufacturing, or transporting such matters as are required in the prosecution of its business, so long as they shall furnish or transport such materials, etc., does not give a manufacturing company the power to purchase the stock of an insolvent rival concern, which has ceased to do business, for the purpose of preventing its reorganization and obtaining its patronage. De La Vergre Refrigerating Machine Co. v. German Savings Inst., 175 U. S. 40.

It seems that in Iowa, where the law allows corporations to be formed with any powers not in excess of the powers possessed by natural persons, a corporation whose articles give it the power to purchase, hold, and sell both real and personal property may buy shares of stock in another corporation, although it may be formed for some particular business, as manufacturing and dealing in a particular commodity, or lending money and making investments, etc. See Iowa Lumber Co. v. Foster, 49 Iowa, 25, 31 Am. Rep. 140; Calumet Paper Co. v. Stotts Investment

press authority, provided there is no express prohibition, whenever the circumstances are such as to render the transaction a necessary or proper means of accomplishing the objects of its creation. "Whether the purchase of stock in one corporation by another is *ultra vires* or not," it was said in an Indiana case, "must depend upon the purpose for which the purchase was made, and whether such purchase was, under all the circumstances, a necessary or reasonable means of carrying out the object for which the corporation was created, or one which under the statute it might accomplish."[24]

Where a corporation created for the purpose of acquiring land, dealing in lumber, and engaging in mining, manufacturing, and transportation is expressly authorized by its charter to "effect a temporary or permanent consolidation with any railroad or transportation company," it may do so by purchasing the stock of a railroad company, and thus obtaining control of it.[25] So, where one railroad company is authorized to purchase the property and franchises of another company, it may accomplish such purpose by purchasing and holding its stock.[26]

If the nature and objects of a corporation require it to invest

Co., 96 Iowa, 147, 59 Am. St. Rep. 362. Compare, however, Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County, 99 Ala. 1, 42 Am. St. Rep. 17.

A foreign railroad company may hold stock in a domestic railroad company when the latter's charter provides that "any state or any citizen, corporation or company of this or any other state or country" may subscribe for and hold stock therein, and where the former's charter gives it power to acquire and hold stock therein. Rogers v. Nashville, Chattanooga & St. L. Ry. Co. (C. C. A.) 91 Fed. 299.

[24] Hill v. Nisbet, 100 Ind. 341, 349.

A manufacturing company may become a member of a mutual insurance company for the purpose of insuring its property. St. Paul Trust Co. v. Wampach Mfg. Co., 50 Minn. 93.

[25] Marbury v. Kentucky Union Land Co., 62 Fed. 335; Tod v. Kentucky Union Land Co., 57 Fed. 47. For somewhat similar cases, see Hill v. Nisbet, 100 Ind. 341; Atchison, Topeka & S. F. R. Co. v. Cochran, 43 Kan. 225, 19 Am. St. Rep. 129; Ryan v. Leavenworth, Atchison & N. Ry. Co., 21 Kan. 365; City of Baltimore v. Baltimore & Ohio R. Co., 21 Md. 50.

A sale by one corporation to another, in consideration of shares in the purchasing company, of all the vendor company's assets, except certain shares in the purchasing company held by the vendor company, is authorized by a grant of power to the vendor to "amalgamate" with another company. Wall v. London & Northern Assets Corp. [1898] 2 Ch. 469, 67 L. J. Ch. 596.

[26] Dewey v. Toledo, Ann Arbor & N. M. Ry. Co., 91 Mich. 351; Hill v. Nisbet, 100 Ind. 341.

funds, it may invest the same in the stock of other corporations, unless there is some express or implied charter or statutory restriction. This is true, for example, of religious and charitable corporations, of corporations for literary and scientific purposes, of insurance companies, trust companies, and the like.[27]

(b) Taking stock as collateral.—There is *dictum* in an Ohio case to the effect that a corporation cannot make a loan and take a pledge of stock in another corporation as collateral, on the ground that, as in the case of a purchase of stock,[28] it would enable the corporation to engage in a different business from that authorized by its charter. This result, said the court, would not follow any the less certainly if the shares were received in pledge only to secure the payment of a debt, provided they were transferred on the books of the company to the name of the pledgee, for a person in whose name the stock of a corporation stands on its books is, as to the corporation, a stockholder, and has the right to vote upon the stock.[29]

This view, however, cannot be sustained. It has repeatedly been held in effect, both in England and in the federal and state courts in this country, that, whenever a corporation has the power to lend money or enter into any other contract, it has the power, unless prohibited by its charter or some other statute, to take a pledge of stock in another corporation to secure payment of the loan or performance of the contract.[30] And it has been held that lending money and taking a pledge of stock of a corporation as collateral are not within a charter or statu-

[27] Hodges v. New England Screw Co., 1 R. I. 347, 53 Am. Dec. 624.

[28] Ante, § 193.

[29] Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 350, 38 Am. Rep. 594, 1 Cum. Cas. 348. The actual decision in this case was merely that a banking corporation which lends money on the security of stock in another corporation cannot compel the latter to transfer the shares on its books so as to entitle it to vote as the holder of them. Furthermore, the corporation was expressly prohibited from taking and holding shares in another corporation.

[30] In re Asiatic Banking Corp., 4 Ch. App. 252, 1 Cum. Cas. 359; Citizens' State Bank of Noblesville v. Hawkins, 34 U. S. App. 423, 71 Fed. 369, 1 Keener's Cas. 735; Germania Nat. Bank of New Orleans v. Case, 99 U. S. 633, 1 Cum. Cas. 948; Kennedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 2 Smith's Cas. 968, 1 Keener's

tory prohibition against subscribing for or purchasing stock except in payment of a *bona fide* debt.[31]

(c) Taking stock in payment of debts.—There is no good reason why a corporation, when it has the power to enter into a contract under which another may become indebted to it, may not take stock in another corporation in payment, even when the contract is made with this understanding, provided there is no express prohibition, and provided the purpose is to sell the stock, and not to hold it.[32] However this may be, a corporation certainly has the power to take stock in another corporation in good faith in payment of a debt *previously* contracted, in order to collect the debt and prevent a loss.[33]

Such a transaction is very generally expressly excepted from a charter or statutory prohibition against the taking and holding of stock in one corporation by another; and, even when there is no express exception, it is held that a prohibition, express or implied, against purchasing and holding stock or deal-

Cas. 727; California Bank v. Kennedy, 167 U. S. 362, 1 Keener's Cas. 737.

See, also, Taylor County Court v. Baltimore & Ohio R. Co., 35 Fed. 161; Shoemaker v. National Mechanics' Bank, 2 Abb. 416, Fed. Cas. No. 12,801; Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa. 147; United States Trust Co. v. Brady, 20 Barb. (N. Y.) 119; Talmage v. Pell, 7 N. Y. 328.

A corporation authorized to lend money on real, chattel, or personal security, to buy, sell, hold, and transfer notes and other securities, and evidences of indebtedness, to make contracts, acquire and transfer property, in like manner as private individuals, has power to take stock in another corporation as collateral security for signing a note on which the corporation obtains money. Calumet Paper Co. v. Stotts Investment Co., 96 Iowa, 147, 59 Am. St. Rep. 362.

[31] Taylor County Court v. Baltimore & Ohio R. Co., 35 Fed. 161; California Bank v. Kennedy, 167 U. S. 362, 1 Keener's Cas. 737. Contra, Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 350, 38 Am. Rep. 594, 1 Cum. Cas. 348.

[32] See Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85; Howe v. Boston Carpet Co., 16 Gray (Mass.) 495.

Contra, Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 1 Keener's Cas. 815.

[33] First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 1 Keener's Cas. 717, 1 Cum. Cas. 368; Citizens' State Bank of Noblesville v. Hawkins, 34 U. S. App. 423, 71 Fed. 369, 1 Keener's Cas. 735; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85.

And see Howe v. Boston Carpet Co., 16 Gray (Mass.) 493; Sumner v. Marcy, 3 Woodb. & M. 105, Fed. Cas. No. 13,609; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

ing in stock, does not apply to the taking of stock in good faith in payment of a debt.[34]

(d) Taking stock to effect compromise.—A corporation may also take stock in another corporation in good faith in order to effect a compromise of a contested claim against it. Thus, it has been held that a national bank, though it has no power to deal in the stock of other corporations, may, in a fair and *bona fide* compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time that, by turning the stocks into money under more favorable circumstances than then existed, a loss which would otherwise accrue from the transaction might be averted or diminished.[35] Such a transaction is not within an express prohibition against dealing in stocks.[36]

(e) Taking stock in payment on sale of property—(1) In general.—It has been held that a manufacturing corporation cannot sell goods to a railroad or other corporation, and take payment therefor in stock of the latter;[37] and this proposition is no doubt sound law when the intention is to hold the stock as an investment or for the purpose of controlling the other corporation. There is no reason, however, why a corporation which has the power to dispose of property should not be allowed, in the absence of express prohibition, to sell it for stock in another corporation, provided the transaction is for the *bona fide* purpose of advantageously disposing of the property, and the stock is taken with a view of selling it and converting it into money.[38]

[34] Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85; First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 1 Keener's Cas. 717, 1 Cum. Cas. 368.

[35] First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 1 Keener's Cas. 717, 1 Cum. Cas. 368, affirming 39 Md. 600.

[36] Id.

[37] Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 1 Keener's Cas. 815.

[38] See Holmes & Griggs Mfg. Co.

—(2) **Sale of entire property.**—It has even been held that a manufacturing company, or other purely private corporation which owes no special duties to the public,[39] may, in the absence of express prohibition, sell all of its property to another corporation,[40] and take stock in the other corporation in payment therefor, provided all the stockholders consent,[41] and provided the transaction is for the *bona fide* purpose of winding up the corporation and distributing the stock among the stockholders.[42]

Even when all the stockholders consent, however, a corporation has no power, unless it is expressly conferred by the legislature, to sell and transfer all of its property to another corporation for stock in the latter, where the purpose is, not to wind up its business and distribute the stock among its shareholders, but to continue its existence as a corporation and hold the stock itself, or, in other words, where the object is to continue corporate life and activity through the instrumentality of the other corporation.[43]

It was said by Judge Lurton in such a case in the federal circuit court of appeals: "There was to be a corporation within a corporation. Individual activity was to cease, but corporate energy was to be exercised through a living corporation, whose life and functions were to be controlled through the shares held by its corporate creator and master. Forbidden to exercise the very functions for which the breath of corporate life had been breathed into it by the state, there would remain standing only

v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85; Howe v. Boston Carpet Co., 16 Gray (Mass.) 495; White v. G. W. Marquardt & Sons, 105 Iowa, 145.

[39] See ante, § 162.

[40] See ante, § 160.

[41] See ante, § 160.

[42] Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85. And see Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490, 1 Smith's Cas. 242; Leathers v. Janney, 41 La. Ann. 1120; Buford v. Keokuk Northern Line Packet Co., 3 Mo. App. 159.

[43] McCutcheon v. Merz Capsule Co., 37 U. S. App. 586, 71 Fed. 787; Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336; People v. Ballard, 134 N. Y. 269, 1 Keener's Cas. 630.

And see Easun v. Buckeye Brewing Co., 51 Fed. 156; Frothingham v. Barney, 6 Hun (N. Y.) 366; Taylor v. Earle, 8 Hun (N. Y.) 1.

the shell of a corporation, retaining corporate existence only for the purpose of controlling and directing the new corporation in which was vested its corporate capital, and to receive and distribute its aliquot proportion of those earnings as dividends among its own shareholders. The effect of this action of the appellee was to divest itself of the power to exercise the essential and vital elements of its franchise, by a renunciation of the right to engage directly and individually in the very business which it was organized to carry on, and is a disregard of the conditions upon which corporate existence was conferred. The state is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions, or maims or cripples their separate activity, by taking away the right freely and independently to exercise the function of their franchise, is contrary to a sound public policy."[44]

§ 195. Presumption of authority.

Since corporations may acquire stock in other corporations for some purposes, it must be presumed that the taking of stock in one corporation by another was *intra vires,* unless the contrary appears.[45]

§ 196. Speculating in stock.

A corporation, even though it may have the power to take and hold shares of stock in other corporations as an investment, or as collateral security for a loan or other debt, or in payment of a debt, has no power to go upon the stock exchange and buy shares as a speculation.[46]

[44] McCutcheon v. Merz Capsule Co., 37 U. S. App. 586, 71 Fed. 787.

[45] In re Rochester, Hornellsville & Lackawanna R. Co., 110 N. Y. 119; Evans v. Bailey, 66 Cal. 112; Ryan v. Leavenworth, Atchison & N. Ry. Co., 21 Kan. 365; ante, § 143.

[46] In re Asiatic Banking Corp., 4 Ch. App. 252, 1 Cum. Cas. 359, per Giffard, L. J.

§ 197. Purchase of stock to control corporation.

The general rule that a corporation cannot purchase and hold stock in another corporation is peculiarly applicable where the object in doing so is to obtain control of the business of the other corporation and remove competition. In such a case the purchase and holding of the stock is contrary to public policy and illegal, as well as *ultra vires*.[47]

§ 198. Rights and liabilities with respect to shares.

When a corporation has the power to take and hold shares in another corporation, and becomes the legal holder of shares, it has the same rights as a shareholder, and is subject to the same liabilities, as a natural person. Like a natural person holding shares, it is entitled to dividends, and is subject to the liability imposed by statute upon the shareholders to contribute to pay the debts of the corporation.[48]

II. Power of a Corporation to Take and Hold its Own Stock.

§ 199. In general.—In England, and in some of the states in this country, it is held that an express grant of authority is necessary to enable a corporation to purchase shares of its own stock, either for the purpose of reissuing or retiring them; but in most states such power exists without an express grant of authority, provided there is no express restriction, and provided the purchase is made in good faith and without prejudice or injury to creditors. A corporation may in all states take its own stock as collateral for or in payment of debts previously contracted in good faith, in order to prevent loss, or in order to effect a compromise.

In England, though it is held that a corporation may deal in

[47] Central R. Co. v. Collins, 40 Ga. 582, 1 Keener's Cas. 706; Elkins v. Camden & Atlantic R. Co., 36 N. J. Eq. 5, 1 Keener's Cas. 722; People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319, 2 Smith's Cas. 952; Pearson v. Concord R. Co., 62 N. H. 537; De La Vergne Refrigerating Machine Co. v. German Savings Inst., 175 U. S. 40.

See, also, McCutcheon v. Merz Capsule Co., 71 Fed. 787; Mallory v. Hanaur Oil Works, 86 Tenn. 598, 1 Keener's Cas. 678; People v. North River Sugar Refining Co., 121 N. Y. 582, 18 Am. St. Rep. 843, 1 Cum. Cas. 570, 2 Smith's Cas. 943.

[48] In re Asiatic Banking Corp., 4 Ch. App. 252, 1 Cum. Cas. 359; post, § 212(e).

the shares of other corporations,[49] it is held that it cannot purchase shares of its own stock, unless it is expressly authorized to do so, whether its purpose be to reissue them or to retire them.[50] "There is a great difference," it is said, "between dealing in the shares of other companies and in its own. The former is ordinary business, attended only with the usual risks of ordinary transactions, but the latter tends inevitably to breaches of their duty on the part of the directors, and to fraud and rigging the market on the part of the corporation itself. Consequently, a corporation, to possess such a power, must have it conferred by the plainest and most explicit language."[51]

In the United States the decisions on this question are conflicting. Some of the courts have held, as in England, that a corporation cannot purchase its own shares of stock, either to retire them or to reissue them, unless such power is expressly conferred by its charter or some other statute.[52] This view is based, not only upon the ground that a corporation cannot in-

[49] Ante, § 193.

[50] Trevor v. Whitworth, 12 App. Cas. 409, 2 Smith's Cas. 977, 1 Keener's Cas. 694, 1 Cum. Cas. 384; In re London, Hamburg & Continental Exch. Bank, 5 Ch. App. 444; Hope v. International Financial Soc., 4 Ch. Div. 327.

[51] Green's Brice, Ultra Vires, 95. In a leading English case it was said: "I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately expend the moneys of the company to any extent they please in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company." Lord Herschell in Trevor v. Whitworth, 12 App. Cas. 409, 1 Keener's Cas. 694, 2 Smith's Cas. 977, 1 Cum. Cas. 384.

[52] Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Currier v. Lebanon Slate Co., 56 N. H. 262, 1 Keener's Cas. 685; Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425, 1 Keener's Cas. 689, 1 Cum. Cas. 393; Morgan v. Lewis, 46 Ohio St. 1, 1 Keener's Cas. 699; State v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258, 1 Cum. Cas. 566.

See, also, Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194; German Sav. Bank v. Wulfekuhler, 19 Kan. 65; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655; Hamor v. Taylor-Rice Engineering Co., 84 Fed. 392; Herring v. Ruskin Co-operative Ass'n (Tenn. Ch. App.) 52 S. W. 327.

In accordance with this doctrine, it has been held that a manufacturing company cannot take its

crease or diminish the amount of the capital stock as fixed by the legislature[53] (a reason which would not apply where shares are purchased and reissued), and on the ground that such a transaction is a fraud upon stockholders and creditors[54] (a reason which would not apply where there are no creditors and all the shareholders consent), but also, and chiefly, on the ground that it is foreign to the purposes for which the corporation was created, and therefore a violation of its charter, and a diversion of its funds to an unauthorized purpose.[55] It follows that in these jurisdictions a purchase of its own shares by a corporation is none the less *ultra vires* because it is made in good faith, with the consent of all the stockholders, and without any intention to defraud creditors.[56] The rule cannot be evaded by purchasing and holding the stock through an agent or trustee.[57]

Contrary and prevailing view.—In a number of states the doctrine that a corporation cannot purchase and hold its own stock, unless expressly authorized to do so, is not recognized. On the contrary, most of the courts in which the question has

own shares in payment for goods sold at the time. St. Louis Carriage Mfg. Co. v. Hilbert, 24 Mo. App. 338.

The rule does not prevent a corporation from selling stock under a contract allowing the purchaser to return it, at his option, after a certain time, and receive back the price paid. Vent v. Duluth Coffee & Spice Co., 64 Minn. 307, 1 Keener's Cas. 705.

Nor is the rule necessarily inconsistent with the forfeiture or surrender of shares in case of nonpayment of assessments. See post, §§ 476, 493.

A statute providing that a corporation, "at a meeting called for the purpose, may increase or reduce its capital stock and the number of shares therein," does not authorize a corporation to reduce its capital stock by purchasing the shares of a stockholder. In order that such reduction may operate justly to all the stockholders, each stockholder should be allowed to surrender such proportion of his stock as the amount of the proposed reduction bears to the whole amount of the capital stock. Currier v. Lebanon Slate Co., 56 N. H. 262, 1 Keener's Cas. 685.

[53] Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Sutherland v. Olcott, 95 N. Y. 100; post, § 411.

[54] 2 Thompson, Corp. § 2054; Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 562.

[55] See Trevor v. Whitworth, 12 App. Cas. 409, 2 Smith's Cas. 977, 1 Keener's Cas. 694, 1 Cum. Cas. 384; Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425, 1 Keener's Cas. 275, 1 Cum. Cas. 293; Morgan v. Lewis, 46 Ohio St. 1, 1 Keener's Cas. 699.

[56] See the cases above cited.

[57] Trevor v. Whitworth, 12 App. Cas. 409, 2 Smith's Cas. 977, 1 Keener's Cas. 694, 1 Cum. Cas. 384; Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560.

arisen have held that it may do so without express authority, in the absence of express restrictions, provided it acts in good faith and without prejudice to the rights of creditors.[58] Private corporations, said the Illinois court, "may purchase their stock in exchange for money or other property, and hold, reissue or retire the same, provided such act is had in entire good faith, is an exchange of equal value, and is free from all fraud, actual or constructive, this implying that the corporation is neither insolvent nor in process of dissolution," and provided "the rights of creditors are not affected."[59]

[58] Chicago, Pekin & S. W. R. Co. v. Town of Marseilles, 84 Ill. 145, 643, 1 Cum. Cas. 374; Clapp v. Peterson, 104 Ill. 26, 2 Smith's Cas. 986, 1 Cum. Cas. 380; Republic Life Ins. Co. v. Swigert, 135 Ill. 150; Hartridge v. Rockwell, R. M. Charlt. (Ga.) 261; Iowa Lumber Co. v. Foster, 49 Iowa, 25, 31 Am. Rep. 140; Rollins v. Shaver Wagon & Carriage Co., 80 Iowa, 380, 20 Am. St. Rep. 427; City Bank of Columbus v. Bruce, 17 N. Y. 507; Blalock v. Kernersville Mfg. Co., 110 N. C. 99; New England Trust Co. v. Abbott, 162 Mass. 148; Dupee v. Boston Water Power Co., 114 Mass. 37, 2 Smith's Cas. 974; Coleman v. Columbus Oil Co., 51 Pa. St. 74; Dock v. Schlichter Jute Cordage Co., 167 Pa. St. 370; Jones v. Morrison, 31 Minn. 140; Cooper v. Frederick, 9 Ala. 738; In re Republic Ins. Co., 3 Biss. 457, Fed. Cas. No. 11,704; First Nat. Bank of Salem v. Salem Capital Flour-Mills Co., 39 Fed. 89; Farmers' & Mechanics' Bank v. Champlain Transp. Co., 18 Vt. 138. See, also, Lowe v. Pioneer Threshing Co., 70 Fed. 646, 2 Smith's Cas. 976; American Railway-Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377; State v. Smith, 48 Vt. 266; Chetlain v. Republic Life Ins. Co., 86 Ill. 220; Chapman v. Iron Clad Rheostat Co., 62 N. J. Law, 497.

See the note on this question in 33 Am. St. Rep. 339.

In New Jersey, a corporation may purchase and hold shares of its own stock, under statutes declaring shares of stock in corporations to be personal property, and vesting corporations with the power to purchase and hold such personal estate as its purposes may require. Chapman v. Iron Clad Rheostat Co., 62 N. J. Law, 497.

In Iowa, where the law authorizes the formation of corporations for any purpose, and with any powers not in excess of those possessed by natural persons, it was held that a corporation whose articles provided that its general and principal business should be the manufacture of and dealing in lumber, etc., but also declared that it should have the power to acquire and transfer, purchase and hold, sell or exchange, any real estate "or other property" that might "be deemed desirable in the transaction of its business," could purchase shares of its own stock, if it acted in good faith, and without injury to creditors. Iowa Lumber Co. v. Foster, 49 Iowa, 25, 31 Am. Rep. 140. See, also, Calumet Paper Co. v. Stotts Investment Co., 96 Iowa, 147, 59 Am. St. Rep. 362.

A corporation which has purchased shares of its own stock cannot vote the same at corporate meetings. Post, chapter xxiv.

[59] Clapp v. Peterson, 104 Ill. 26, 1 Cum. Cas. 380, 2 Smith's Cas. 986.

In a Georgia case it was said in speaking of a bank: "If, from the course of business, or the state of things, the capital of the bank cannot be usefully employed in loans, there can be no objection against the purchase of its own stock. In such purchases a part of the capital stock is withdrawn, but it is represented by the stock purchased; when dividends are declared, the profits of so much of the stock as may have been purchased belong to the remaining stockholders, and is nothing more than the profit to which they would have been entitled, if instead of appropriating so much of the capital to the purchase of stock, it had been used for making loans."[60]

Express restriction.—Sometimes the charter of a corporation or the general law under which it is organized expressly prohibits it from purchasing its own stock. Thus, the national bank act expressly prohibits a national bank from purchasing or holding shares of its own capital stock except when it is necessary to prevent loss on a debt previously contracted in good faith.[61]

§ 200. Fraud or prejudice to stockholders or creditors.

Even in those jurisdictions in which it is held that a corporation may purchase its own stock, the rule is subject to the condition that the purchase shall be made in good faith and without prejudice to the rights of other stockholders or creditors. It is unauthorized and invalid if made for the purpose of defrauding or injuring other stockholders or creditors of the corporation,[62] or if it does in fact defraud or prejudice creditors, though made in the most perfect good faith.[63] "If it were

[60] Hartridge v. Rockwell, R. M. Charlt. (Ga.) 260.

[61] Rev. St. U. S. § 5201. See First Nat. Bank of Xenia v. Stewart, 107 U. S. 676, 1 Cum. Cas. 397; First Nat. Bank of South Bend v. Lanier, 11 Wall. (U. S.) 369.

[62] Chicago, Pekin & S. W. R. Co. v. Town of Marseilles, 84 Ill. 145, 643, 1 Cum. Cas. 374; Clapp v. Peterson, 104 Ill. 26, 1 Cum. Cas. 380, 2 Smith's Cas. 986; Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331; Columbian Bank's Estate, 147 Pa. St. 422; Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 Am. St. Rep. 539; Heggie v. People's Building & Loan Ass'n, 107 N. C. 581.

[63] Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331; Clapp v. Peterson, 104 Ill. 26, 1 Cum. Cas. 380, 2 Smith's Cas. 986; Adams & Westlake Co. v.

shown," said the Illinois court, "that the purchase was made to promote the interests of the officers of the company alone, and not the stockholders generally, or if for the benefit of a portion of the stockholders and not all, or for the injury of all or only a portion of them, or if it operated to the injury of creditors, or would defeat the end for which the body was created, or if it was done for any other fraudulent purpose, then chancery could interfere."[64]

§ 201. Taking stock as collateral.

Certainly in those states in which it is held that a corporation may purchase shares of its own stock, and probably in all jurisdictions, in the absence of express restrictions, a corporation which has the power to make a loan may take and hold shares of its own stock as collateral. And there can be no doubt that in all the states, in order to prevent a loss, it may take its own shares as collateral for a debt previously contracted in good faith, unless there is an express charter or statutory restriction.[65] The national bank act expressly prohibits a national bank from making any loan or discount on the security of the shares of its own capital stock, unless such security is necessary to prevent loss on a debt previously contracted in good faith.[66]

§ 202. Taking stock in payment of debts.

In the absence of express restrictions, even in those states

Deyette, 5 S. D. 418, 49 Am. St. Rep. 887.

A purchase of its own stock by a corporation by exchange for its property of an equal value, although made in good faith, and without any element of fraud, or anything in the apparent condition of the corporation to interfere with the making of the exchange, will not be sustained if a creditor of the corporation is prejudiced thereby; and it can make no difference that the indebtedness was not at the time established or known to the stockholders. Clapp v. Peterson, 104 Ill. 26, 1 Cum. Cas. 380, 2 Smith's Cas. 986; Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331.

[64] Chicago, Pekin & S. W. R. Co. v. Town of Marseilles, 84 Ill. 643, 1 Cum. Cas. 377, 379.

[65] Williams v. Savage Mfg. Co., 3 Md. Ch. 452; German Sav. Bank v. Wulfekuhler, 19 Kan. 65; and cases cited in notes 66-69, infra.

[66] Rev. St. U. S. § 5201; First Nat. Bank of Xenia v. Stewart, 107 U. S. 676, 1 Cum. Cas. 397; First Nat. Bank of South Bend v. Lanier, 11 Wall. (U. S.) 369; Feckheimer v. National Exchange Bank of Norfolk, 79 Va. 80.

in which power on the part of a corporation to purchase shares of its own stock is denied, a corporation has the power, in order to prevent loss, to take its own shares in payment of a debt previously contracted in good faith.[67] The national bank act expressly gives such power to national banks, though it prohibits them from otherwise purchasing their own shares; but it requires them to sell shares so acquired, at public or private sale, within six months after taking the same.[68]

§ 203. Taking stock to effect compromise.

A corporation may also take shares of its own stock, in the absence of express restriction, even in those jurisdictions in which it is held that it cannot purchase its own stock, in order to effect a compromise of a disputed claim against the holder, whether the claim arises out of the latter's subscription to its capital stock, or out of some other contract or transaction.[69]

[67] Currier v. Lebanon Slate Co., 56 N. H. 262, 1 Keener's Cas. 685; Taylor v. Miami Exporting Co., 6 Ohio, 83; Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425, 1 Keener's Cas. 689, 1 Cum. Cas. 393; Morgan v. Lewis, 46 Ohio St. 1, 1 Keener's Cas. 694; Williams v. Savage Mfg. Co., 3 Md. Ch. 452; Chillicothe Branch of Ohio State Bank v. Fox, 3 Blatchf. 431, Fed. Cas. No. 2,683; State v. Smith, 48 Vt. 266; Governor v. Baker, 14 Ala. 652; City Bank of Columbus v. Bruce, 17 N. Y. 507; Ex parte Holmes, 5 Cow. (N. Y.) 426; Barton v. Port Jackson & Union Falls Plank Road Co., 17 Barb. (N. Y.) 407; Yeaton v. Eagle Oil & Refining Co., 4 Wash. 185; Barto v. Nix, 15 Wash. 563; St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142.

[68] When a national bank takes its own stock in payment of a debt previously contracted, and sells the same within six months, it may sell on credit, provided it acts in good faith, and take the note of the purchaser secured by a pledge of the stock as collateral. Union Nat. Bank v. Hunt, 76 Mo. 440.

[69] State v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258, 1 Cum. Cas. 566; Morgan v. Lewis, 46 Ohio St. 1, 1 Keener's Cas. 699; Berks & Dauphin Turnpike Road v. Meyers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402. And see post, § 476.

CHAPTER XII.

EFFECT OF ULTRA VIRES AND ILLEGAL TRANSACTIONS.

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I. Introductory.

§ 204. In general.—Although the doctrine is well settled that the powers of a corporation are such only as are conferred upon it by its charter, and that acts in excess of such powers are ultra vires, this does not mean that it is impossible for a corporation to exceed the powers so conferred upon it in such a sense that an ultra vires act cannot under any circumstances be regarded as the act of the corporation. It means simply that it has no authority or right to exceed its powers. An ultra vires act, therefore, may be the act of the corporation, and may under some circumstances give rise to legal or equitable rights and liabilities. It is sometimes very difficult, however, to determine what these rights and liabilities are, and on some points the decisions of the different courts are in hopeless conflict.

There is perhaps no part of the law concerning corporations in which we meet with so much difficulty, confusion, and conflict of opinion as in that which relates to the effect of *ultra vires* transactions. We have already considered at length the powers of corporations, and have seen that a corporation has such powers only as are expressly or impliedly conferred upon it by its charter. We are now to ascertain, as well as the state

of the law will permit, the effect of transactions on the part of a corporation which are in excess of its powers. Such transactions are said to be *ultra vires,* or *extra vires.* Transactions which are within the powers of a corporation are said to be *intra vires.*

§ 205. Different senses in which the expression "ultra vires" is used.

Unfortunately the expression *"ultra vires"* has been used by the courts and by writers on corporation law in more than one sense, and this has resulted in some confusion. Therefore, when the expression is used in the decision of a court, it is necessary, in order to correctly interpret the decision, to ascertain the sense in which it is used by construing it with reference to the facts of the particular case.

When properly used, the words *"ultra vires,"* as applied to the act of a corporation, mean simply an act which is beyond the powers (*ultra vires*) conferred upon the corporation by its charter, as distinguished from an act which is authorized by its charter. The act need not necessarily be expressly prohibited by the charter or by any other statute. Nor need it be in any sense immoral or injurious to others. It may be an act which could be lawfully done by a natural person. It may be even praiseworthy, as in the case of a gift by a corporation for charitable or religious purposes. Yet, if it is not authorized by the charter of the corporation, it is *ultra vires.* In other words, an *ultra vires* act by a corporation, in the proper sense, is simply an unauthorized act.[1]

[1] "When acts of corporations are spoken of as ultra vires, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created." Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 1 Cum. Cas. 253. And see Bissell v. Michigan Southern & Northern Indiana R. Cos., 22 N. Y. 259, 1 Smith's Cas. 522, 1 Cum. Cas. 187; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Smith's Cas. 557, 1 Cum. Cas. 152.

The expression *"ultra vires"* is also applied to acts of a corporation which are immoral or contrary to some settled principle of public policy, or which are in violation of an express prohibition in its charter or some other statute. Such an act is *ultra vires,* of course, but it is something more. It is illegal, not merely because it is *ultra vires,* or beyond the powers conferred upon the corporation, but, as in the case of an act of a natural person, because of its immorality, its being contrary to public policy, or its being in violation of an express legislative prohibition. As we shall presently see, the rules of law which apply to such an act are different from the rules which apply to an act which is merely *ultra vires* in the proper sense.[2]

The expression *"ultra vires"* has also been applied to acts done by the directors or other officers of a corporation in excess of the powers conferred upon them by the stockholders. Such an act, however, it not necessarily *ultra vires* the corporation. An act may be within the powers of a corporation and not within the powers of the directors, for the powers of the latter are derived, not from the legislature, like the powers of the corporation, but from the stockholders in their corporate capacity. A result of this distinction is that the stockholders of a corporation, while they cannot by ratification render valid an act which is beyond the powers of the corporation, may ratify an act which is within its powers, but beyond the powers of the directors.[3]

§ 206. Ultra vires acts as the acts of the corporation.

(a) Early doctrine.—The doctrine so often laid down by the courts,—that a corporation has such powers only as are conferred upon it by its charter,—if taken literally, would be equivalent to saying that an act done by the officers of a cor-

[2] See Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Smith's Cas. 465, 1 Cum. Cas. 164; White v. Franklin Bank, 22 Pick. (Mass.) 181, 1 Keener's Cas. 749, 1 Cum. Cas. 239; Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Smith's Cas. 190, 1 Keener's Cas. 650, 1 Cum. Cas. 331; post, § 222 et seq.

[3] See Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Smith's Cas. 557, 1 Cum. Cas. 152.

poration on its behalf and in its name, but in excess of its powers, even though authorized by the stockholders in their corporate capacity, is not the act of the corporation at all, or, in other words, that it is impossible for a corporation, as distinguished from its officers and stockholders, to do an act which is not authorized by its charter; and in some of the earlier cases it was so held. In an Ohio case, for instance, where a corporation, acting *ultra vires,* had entered into a contract and taken the note of a third person indorsed by the other party to the contract, it was held that the corporation acquired no title to the note and could not enforce it. The court said: "If a fair construction of its charter does not confer the power, it is incompetent to become a party to the contract of indorsement, and without capacity to take or hold the title. As well might a dead man, by the mere act of the indorser, be invested with the legal interest, as a corporation, which only lives for the purposes and objects intended by the legislature. Beyond these limits it has no existence, and its acts are neither more nor less than a nullity."[4]

(b) **Modern doctrine.**—This view, however, cannot be sustained, and it has been expressly repudiated in a number of cases. The rule that a corporation has no powers except such as are conferred by its charter cannot and does not mean that it cannot exceed its powers. A corporation has no *right* or *authority* to do acts which are not within the powers conferred upon it by the legislature, but, as in the case of an individual, it is possible for it to do wrong. It may exceed its powers and do an *ultra vires* act, and the act will be, in contemplation of the law, not merely the act of the officers or stockholders, but the act of the corporation itself.[5] "Like natural persons,"

[4] Straus v. Eagle Ins. Co., 5 Ohio St. 60. See, also, Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Keener's Cas. 457, 1 Smith's Cas. 564, 1 Cum. Cas. 173; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Smith's Cas. 557, 1 Cum. Cas. 152.

[5] Bissell v. Michigan Southern & Northern Indiana R. Cos., 22 N. Y. 259, 1 Smith's Cas. 522, 1 Cum. Cas. 187; People v. North River Sugar Refining Co., 121 N. Y. 582, 18 Am. St. Rep. 843, 1 Smith's Cas. 943, 1 Cum. Cas. 570; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. (N. Y.) 31; Denver Fire

said Chief Justice Comstock in a New York case, corporations "can overleap the legal and moral restraints imposed upon them: in other words, they are capable of doing wrong. * * * The distinction * * * is no more to be lost sight of in respect to artificial than in respect to natural persons."[6] It follow from this that there is nothing in the *nature* of a corporation which must necessarily prevent it from acquiring rights or incurring liabilities by reason of an *ultra vires* act.

(c) Illustrations.—As we shall presently see, an *ultra vires* act of a corporation is a violation of its charter *by the corporation,* for which the state may institute proceedings to forfeit the charter.[7] A conveyance or transfer of property to or by a corporation may transfer the title, though the corporation has no power under its charter to hold or transfer the property.[8] When an *ultra vires* contract with a corporation is fully executed by both parties, the courts will not interfere at the instance of either party to deprive the other of the rights acquired under the contract.[9] Actions *quasi ex contractu* may be maintained under some circumstances, by or against a corporation, for money or property loaned, paid, or delivered under an *ultra vires* contract.[10] And in some states, though not in all, when an *ultra vires* contract with a corporation has been fully performed by one of the parties, and the other has received the benefit of such performance, the latter is estopped to set up the *ultra vires* character of the transaction to defeat an action on the contract itself.[11] Torts and crimes are always *ultra vires,* and yet it is well settled that a corporation may commit a tort and be liable in damages therefor,[12] and that it may be guilty of a misdemeanor, and be indicted, convicted, and fined therefor.[13] This is sufficient to show beyond any doubt that a corporation may exceed its powers.

Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 1 Smith's Cas. 568, 1 Cum. Cas. 227.

[6] Bissell v. Michigan Southern & Northern Indiana R. Cos., 22 N. Y. 259, 1 Smith's Cas. 522, 1 Cum. Cas. 187.

[7] Post, § 207.

[8] Post, § 228.

[9] Post, § 212.

[10] Post, § 215(b).

[11] Post, § 214(b).

[12] Post, § 236 et seq.

[13] Post, § 246 et seq.

II. Quo Warranto by the State.

§ 207. In general.—An ultra vires act by a corporation is a violation of its charter for which the state may proceed against it by quo warranto to forfeit its charter, or the state may maintain quo warranto to oust it from the exercise of the unauthorized power.

When the state creates a corporation, the grant of the charter is on the implied condition that the corporation shall act within the powers conferred upon it. *Ultra vires* acts, whether otherwise wrong or not, are a breach of this condition. Such an act does not of itself put an end to the existence of the corporation, but it is, subject to qualifications which will hereafter be explained, ground for a direct proceeding by the state to obtain a judgment of forfeiture.[14]

When a corporation is guilty of exercising powers not authorized by its charter, the state, instead of proceeding against it to obtain a judgment forfeiting its charter, may proceed by *quo warranto,* to obtain a judgment merely ousting it from the further exercise of the unauthorized powers.[15]

III. Remedy in Equity by Injunction.

§ 208. In general.—A court of equity has no jurisdiction to enjoin a corporation from exercising powers not conferred upon it by its charter, either at the suit of the attorney or solicitor general on behalf of the state, or at the suit of an individual, unless the exercise of such jurisdiction is necessary to prevent a public nuisance, to administer a charitable trust, or to protect or enforce some recognized private right.

A minority of the stockholders of a corporation, or a single stockholder, may maintain a suit to restrain a corporation or its officers from diverting its funds to unauthorized purposes, or

[14] People v. North River Sugar Refining Co., 121 N. Y. 582, 18 Am. St. Rep. 843, 1 Smith's Cas. 943, 1 Cum. Cas. 570; State v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258, 1 Smith's Cas. 375, 1 Cum. Cas. 566; post, § 312 et seq.

[15] People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Attorney General v. City of Salem, 103 Mass. 138; People v. River Raisin & Lake Erie R. Co., 12 Mich. 389, 86 Am. Dec. 64.

from carrying out an ultra vires contract. And a suit in equity may be maintained by other persons to enjoin an ultra vires act if it constitutes a violation of their private rights, and there is no adequate remedy at law.

§ 209. Suit by the attorney general.

A court of equity does not administer punishment or enforce forfeitures for transgressions of law, but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had at law; and therefore a court of equity has no jurisdiction of a bill or information by the attorney or solicitor general in the name or on behalf of the state to restrain a corporation from engaging in transactions which are prohibited or not authorized by its charter, if this is the only ground for relief.[16] In such a case the remedy of the state is at law by an information in the nature of *quo warranto,* either to forfeit the charter of the corporation, or to oust it from the exercise of the unauthorized or prohibited powers, as is elsewhere shown.[17]

Suit to enjoin or prevent nuisance.—There is an exception to this rule where the unauthorized acts of the corporation, which it is sought to enjoin, constitute or create or threaten to create a public nuisance, or otherwise injuriously affect or endanger the public interests. In such a case a court of equity has jurisdiction to enjoin the nuisance or injury, and its jurisdiction is not defeated by the fact that the acts of the corporation are a violation of its charter or *ultra vires.*[18] For example, it

[16] Attorney General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227, 1 Smith's Cas. 381, 1 Cum. Cas. 585; Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Independent Order of Foresters v. United Order of Foresters, 94 Wis. 234.

[17] Ante, § 207.

[18] Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361, 1 Cum. Cas. 589; Attorney General v. Great Northern Ry. Co., 4 De Gex & S. 75; Attorney General v. Oxford, Worcester & W. Ry. Co., 2 Wkly. Rep. 330. See, also, Attorney General v. Mid-Kent Ry. Co., 3 Ch. App. 100; Attorney General v. Leeds Corporation, 5 Ch. App. 583; Attorney General v. Great Eastern Ry. Co., 11 Ch. Div. 449; Attorney General v. Great Northern Ry. Co., 1 Drew & S. 154; Attorney General v. Cohoes Co., 6 Paige (N. Y.) 133, 29 Am. Dec. 755.

has been held in England that an information in equity by the attorney general will lie to restrain a railroad company from the *ultra vires* and unlawful obstruction of a public highway,[19] or from the unauthorized opening of a line which will be unsafe to the public.[20] And in a Massachusetts case it was held that such an information would lie to restrain a corporation from *ultra vires* acts which would result in an unauthorized drawing of water from a public pond, so as to impair the rights of the public in the use of the pond for fishing, boating, and other lawful purposes, and so as to create and expose on the shores of the pond slime, mud, and offensive vegetation detrimental to the public health.[21]

The jurisdiction of a court of equity to abate or prevent a nuisance at the suit of the attorney general is limited to such public nuisances as affect and endanger the public safety or convenience, and require immediate judicial interposition, and where the relief sought cannot be otherwise obtained with equal facility. And it has been held, therefore, that the attorney general cannot maintain a suit against a gaslight company, a contractor with it, and one of its officers, to restrain the laying of gas pipes in the streets of a city, on the ground that the powers of the company have ceased because of failure on its part to commence business within the time prescribed by its charter, and that the laying of the pipes will be an injury to the highway and a public nuisance.*

[19] Attorney General v. Great Northern Ry. Co., 4 De Gex & S. 75.

[20] Attorney General v. Oxford, Worcester & W. Ry. Co., 2 Wkly. Rep. 330.

[21] Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361, 1 Cum. Cas. 589.

In Attorney General v. Mid-Kent Ry. Co., 3 Ch. App. 100, a mandatory injunction was granted upon the information of the attorney general to compel a railroad company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter.

And in Attorney General v. Great Northern Ry. Co., 1 Drew & S. 154, the vice chancellor restrained a railroad company from trading in coal in large quantities, upon the ground that there was danger that, if it was allowed to go on, it might get into its hands the coal trade of the whole district through which its railroad ran, and thus acquire a monopoly injurious to the public.

*People v. Equity Gas Light Co., 141 N. Y. 232. See, also, Attorney General v. Metropolitan R. Co.,

Charitable trusts.—Another exception is in the case of corporations created for the purpose of administering a charitable trust, the beneficiaries of which are so numerous as to render it necessary for a court of equity to interpose at the suit of the state for the purpose of enjoining or redressing breaches of trust.[22]

§ 210. Suit by stockholders.

The stockholders of a corporation have a right to expect and to insist that its funds shall not be diverted either by giving them away or by employing them in an *ultra vires* business or transaction, and any stockholder, therefore, has such an interest that he may apply to a court of equity for an injunction to prevent such a diversion, even though all the other stockholders may consent. Thus, it was held in a leading English case that a shareholder in a railroad company could maintain a bill in equity to enjoin the company from taking proceedings to form a steam-packet company to run a line of packets beyond the terminus of its road, and guarantying a certain dividend on the stock of the packet company.[23] In like manner a stockholder may sue to enjoin a corporation from using its funds in the *ultra vires* purchase of shares of stock in another corporation.[24] This question is further considered in a subsequent section.[25]

IV. EFFECT OF ULTRA VIRES CONTRACTS.

§ 211. In general.—The courts do not agree as to the effect of an ultra vires contract with a corporation, and therefore it is not possible to formulate a general rule which will apply in all

125 Mass. 515; Attorney General v. Tudor Ice Co., 104 Mass. 239; Attorney General v. Bay State Brick Co., 115 Mass. 431, 438; Attorney General v. Sheffield Gas Consumers' Co., 3 De Gex, M. & G. 304.

[22] Attorney General v. Garrison, 101 Mass. 223.

[23] Colman v. Eastern Counties Ry. Co., 10 Beav. 1, 1 Keener's Cas. 446, 1 Cum. Cas. 136.

[24] Central R. Co. v. Collins, 40 Ga. 582, 1 Keener's Cas. 786. See, also, Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336.

[25] See post, § 539.

jurisdictions. The following may be given as a summary of the decisions:

(1) If the contract is fully executed on both sides, the courts will not interfere to deprive either party of what has been acquired under it.

(2) If the contract is executory on both sides, it is void, and as a rule neither party can maintain an action, either for specific performance or to recover damages for nonperformance. And this rule applies notwithstanding the contract has been partly performed on both sides.

(3) Where the contract is executory on one side only, and has been fully executed on the other, so that one of the parties has furnished the consideration, in money, property, or services, for the promise of the other, the courts differ as to whether an action will lie on the contract by the party thus furnishing the consideration.

(a) Some courts hold that the express contract is void, and that no action will lie upon it, the remedy, if any, being quasi ex contractu for what has been received under the contract.

(b) Other courts hold that the party thus receiving the consideration is estopped to set up that the contract is ultra vires, in order to defeat an action on the contract.

(4) When either of the parties to an ultra vires contract has received money or property under the same, it must be restored on repudiating the contract. And, therefore,

(a) When one of the parties repudiates an ultra vires contract after receiving money, property, or services under it, the other party may maintain an action on implied or quasi contract to recover the money or the value of the property or services.

(b) In a proper case he may have an accounting in equity.

(c) Restoration of the money or property will be required in equity before granting relief by way of rescission.

(5) A corporation is liable on a contract which is apparently

within its powers, although it is rendered ultra vires by reason of extrinsic facts, if such facts were not within the knowledge of the other party.

(6) If a corporation has the power, under some circumstances, to become a party to negotiable instruments, and it does so for for an unauthorized purpose, it cannot set up the defense of ultra vires as against a bona fide purchaser for value. This rule applies to accommodation paper.

(7) If a contract is ultra vires in part only, the part which is authorized may be enforced, if it can be separated from the part which is unauthorized.

(8) A corporation may set up the defense of ultra vires when sued on a contract entered into by it as agent for an undisclosed principal.

(9) A corporation is not liable on a contract into which it has entered without complying with mandatory charter or statutory requirements as to form or mode of contracting, so long as the contract is wholly executory. But, by the weight of authority, it is liable where the contract has been executed by the other party; and it is liable on implied contract for money or the value of property or services received by it under the contract.

A corporation may contract in excess of its powers.—As we have seen in a previous section, the doctrine that a corporation has the power to do such acts only as are expressly or impliedly authorized by its charter does not mean that it is *impossible* for a corporation to do unauthorized acts. As we shall presently see, a corporation can commit torts and crimes, though such acts are always *ultra vires*. And it is equally *possible*, as distinguished from lawful, for a corporation to enter into an *ultra vires* contract. The rule that a corporation can lawfully enter into such contracts only as are expressly or impliedly authorized by its charter is frequently disregarded in practice, and the question then arises as to how such a contract shall be treated by the courts, and whether it can create any rights as between the parties which the courts will enforce. As we shall see in the following sections, there are some propositions

pertaining to the subject which are beyond dispute, but on others the courts have not agreed.*

§ 212. Contracts executed on both sides.

(a) In general.—When an *ultra vires* contract with a corporation has been fully performed on both sides, neither party can maintain an action to set aside the transaction or to recover what has been parted with. In other words, neither a court of law nor a court of equity will interfere in such a case to deprive either the corporation or the other party of money or property acquired under the contract.[26] This is true even in those jurisdictions in which it is held, as we shall presently see, that performance of an *ultra vires* contract by one of the parties does not make it enforceable against the other.

"It is thoroughly well settled law," said the Alabama court in a late case, "that a party to an *ultra vires* executory contract made with a corporation is not estopped to set up the want of corporate capacity in the premises, either by the fact of contracting, whereby the power to contract is, in a sense, admitted or recognized,[27] or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself.[28] But, where the contract is fully executed—where whatever was contracted to be done on either hand has been done—a different rule prevails. In such case, the law will not interfere, at the instance of either party, to undo that which it was

* For a valuable note on this subject, see 70 Am. St. Rep. 156-180.

[26] First Nat. Bank of Xenia v. Stewart, 107 U. S. 676, 1 Cum. Cas. 397; Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 1 Keener's Cas. 766, 1 Smith's Cas. 457; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 1 Smith's Cas. 453, 1 Keener's Cas. 551, 1 Cum. Cas. 85; Parish v. Wheeler, 22 N. Y. 494, 2 Cum. Cas. 58; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85; Fayette Land Co. v. Louisville & Nashville R. Co., 93 Va. 274, 1 Smith's Cas. 459. See, also, James v. Eve, L. R. 6 H. L. 335; Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 468; Thompson v. Lambert, 44 Iowa, 239; Wilson v. Carter Oil Co. (W. Va.) 33 S. E. 249; Bigbee & W. R. Packet Co. v. Moore, 121 Ala. 379.

[27] See post, § 213(b).

[28] Some courts, as we shall see, allow an action in such a case. See post, § 214(b).

originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other."[29]

(b) Loans and security.—Thus, it has been held that after a corporation has made a loan and taken a pledge of property as security, and has disposed of the property and applied the proceeds to the payment of the loan, the borrower cannot maintain an action to recover the proceeds of the property on the ground that the taking of the security was *ultra vires*.[30]

(c) Conveyance or transfer to corporation.—If a corporation enters into an *ultra vires* contract to purchase property, real or personal, and the contract is fully performed by payment and a conveyance or transfer of the title, the effect of the transaction is to vest the title in the corporation, at least as against all persons but the state, and the corporation may afterwards sell the same.[31] The other party cannot, in such a case, maintain a suit to rescind the sale and recover the property.[32] Where a corporation purchases a note, and the note is transferred to it, the title passes, and it may maintain an action thereon against the maker and indorsers.[33]

(d) Conveyance or transfer by corporation.—The same is true of a contract by a corporation to sell property, real or personal, which is fully executed. The title to the property passes by the conveyance or transfer, and the corporation cannot maintain a suit to rescind and to recover the property.[34]

[29] McClellan, J., in Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 1 Keener's Cas. 766, 1 Smith's Cas. 457.

[30] First Nat. Bank of Xenia v. Stewart, 107 U. S. 676, 1 Cum. Cas. 397.

[31] Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 1 Smith's Cas. 453, 1 Keener's Cas. 551, 1 Cum. Cas. 85; Fayette Land Co. v. Louisville & Nashville R. Co., 93 Va. 274, 1 Smith's Cas. 459; Parish v. Wheeler, 22 N. Y. 494, 2 Cum. Cas. 58; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85; Hough v. Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230, 1 Cum. Cas. 90. And see the other cases cited post, §§ 228, 229.

[32] Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 1 Keener's Cas. 766, 1 Smith's Cas. 457.

[33] National Pemberton Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235.

[34] American Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 188, 1 Fed. 745, 1 Smith's Cas. 469, 1 Cum. Cas. 284. And see the cases cited post, § 231.

(e) **Purchase of stock in another corporation.**—It has been held that when a corporation makes an *ultra vires* purchase of stock in another corporation, and the contract is fully executed by both parties, it cannot compel the other corporation to transfer the stock to it on the books, so as to entitle it to vote at the meetings of stockholders, or vote after such a transfer;[35] but, as the contract is executed, it acquires title to the stock, so as to be able to sell the same, to receive dividends, and to become liable under a statute to contribute as stockholders to payment of the debts of the other corporation.[36]

(f) **Partnership.**—Where a corporation and an individual have assumed to enter into a partnership, and have jointly transacted business, they may recover by reason of their joint interest, on obligations made to them in their joint name, irrespective of any question as to their partnership rights *inter se,* and notwithstanding the fact that it was *ultra vires* for them to enter into the partnership.*

§ 213. Contracts executory on both sides.

(a) **In general.**—So long as an *ultra vires* contract is wholly executory on both sides, it is void, and neither party is estopped to deny the power of the corporation to make it. It follows that no action can be based upon such a contract, either by the corporation[37] or against it.[38]

[35] Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 350, 38 Am. Rep. 594, 1 Cum. Cas. 348; Milbank v. New York, Lake Erie & W. R. Co., 64 How. Pr. (N. Y.) 20, 1 Smith's Cas. 963, 1 Cum. Cas. 353.

[36] Germania Nat. Bank of New Orleans v. Case, 99 U. S. 628, 1 Cum. Cas. 948; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85; Milbank v. New York, Lake Erie & W. R. Co., 64 How. Pr. (N. Y.) 20, 1 Smith's Cas. 963, 1 Cum. Cas. 353. See, however, California Bank v. Kennedy, 167 U. S. 362, 1 Keener's Cas. 737, reversing Kennedy v. California Savings Bank, 107 Cal. 495, 40 Am. St. Rep. 69, 1 Keener's Cas. 727.

Where a corporation purchases or subscribes for stock in another corporation, and the contract is fully executed, the defense of ultra vires cannot be set up by the corporation to defeat an action to recover dividends. Bigbee & W. R. Packet Co. v. Moore, 121 Ala. 379.

* Wilson v. Carter Oil Co. (W. Va.) 33 S. E. 249.

[37] Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44; Day v. Spiral Springs Buggy

This is true even in those states in which, as we shall presently see, it is held that a contract fully executed on one side may support an action. "While executed contracts, made by corporations in excess of their legal powers," it was said in a New York case, "have, in some cases, been upheld by the courts, and parties have been precluded from setting up, as a defense to actions brought by corporations, their want of power to enter into such contracts, this doctrine has never been applied to a mere executory contract which is sought to be made the foundation of an action, either by or against such corporations."[39]

(b) Estoppel to deny power to contract.—As was shown in a previous chapter, an association which assumes to exercise corporate powers, and enters into a contract as a corporation, and persons who contract with it as a corporation, are estopped, in an action on the contract, to deny its corporate existence.[40]

Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14, 1 Smith's Cas. 497, 1 Keener's Cas. 781, 1 Cum. Cas. 293; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Smith's Cas. 590, 1 Cum. Cas. 245; Screven Hose Co. v. Philpot, 53 Ga. 625; Shrewsbury & Birmingham Ry. Co. v. Northwestern Ry. Co., 6 H. L. Cas. 113; Wilks v. Georgia Pacific R. Co., 79 Ala. 180; Madison, Watertown & M. Plank Road Co. v. Watertown & Portland Plank Road Co., 7 Wis. 59; Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co., 70 Miss. 669, 35 Am. St. Rep. 681.

[38] Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Smith's Cas. 557, 1 Cum. Cas. 152; Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Smith's Cas. 465, 1 Cum. Cas. 164; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44; McCutcheon v. Merz Capsule Co., 37 U. S. App. 586, 1 Smith's Cas. 503; Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425, 1 Keener's Cas. 689, 1 Cum. Cas. 393; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Smith's Cas. 564, 1 Keener's Cas. 457, 1 Cum. Cas. 173; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Smith's Cas. 590, 1 Cum. Cas. 245; Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Smith's Cas. 148, 1 Cum. Cas. 148; Simmons v. Troy Iron Works, 92 Ala. 427; Holt v. Winfield Bank, 25 Fed. 812; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334; Easun v. Buckeye Brewing Co., 51 Fed. 156; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453; McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203; Louisville, New Albany & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552.

[39] Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14, 1 Smith's Cas. 497, 1 Keener's Cas. 781, 1 Cum. Cas. 293.

[40] Ante, § 83 et seq.

This principle, however, does not apply where the question is whether a contract is within the powers conferred upon a corporation by its charter. Every person is chargeable with notice of the powers conferred upon a corporation by its charter or articles of incorporation, and neither the corporation nor the person contracting with it is estopped, merely by reason of entering into the contract, from pleading that it is *ultra vires*.[41]

Power on the part of a manufacturing corporation to enter into a contract of speculation, said Chief Justice Cooley in a Michigan case, "being withheld on reasons of public policy, for the protection of shareholders and the general good of the community, the act neither of one party nor of both in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power which the state for general reasons has withheld from it."[42]

As we shall presently see, however, a corporation may be estopped to deny its power to enter into a particular contract, where the contract is apparently within its powers, and is rendered *ultra vires* because of extraneous facts peculiarly within the knowledge of the corporation, and not known to the other party.[43] And in some states, though not in all, an estoppel to set up that a contract is *ultra vires* may arise, either against the corporation or against the other party, where the contract has been performed by one of the parties and the other has received the benefit of such performance.[44]

(c) **Part performance.**—The fact that an *ultra vires* contract which is executory on both sides has been partly performed will not entitle either party to maintain an action against the other

[41] Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334; Huter v. Union Trust Co. (Ind.) 51 N. E. 1071; Louisville, New Albany & C. R. Co. v. Louisville Trust Co., 174 U. S. 552; National Home Building & Loan Ass'n v. Home Savings Bank, 181 Ill. 35, 72 Am. Rep. 245; and other cases cited above.

[42] Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261.

[43] See post, § 216.

[44] See post, § 214(b).

to compel performance of the residue, or to recover damages for failure to perform.[45]

(d) Suit for specific performance.—A corporation which has entered into an *ultra vires* contract cannot maintain a suit in equity to compel specific performance by the other party. Thus, a banking corporation, since it has no power to buy land for the purpose of selling it again, and cannot make a contract with another to buy land and sell and convey the same to him, cannot, after having purchased the land in pursuance of such a contract, maintain a bill in equity to compel the other party to take a conveyance and pay for it.[46]

(e) Purchase of property.—These rules apply to *ultra vires* contracts for the purchase or sale of property, in so far as they are executory on both sides. Where a corporation enters into an *ultra vires* executory contract to purchase property, real or personal, and refuses to take and pay for the same, the other party can neither maintain an action at law against it to recover damages for breach of contract, nor a suit in equity to compel specific performance.[47] It has even been held that, where a corporation enters into an *ultra vires* contract to purchase property to be manufactured for it, it may refuse to take the property after it has been manufactured, and that if it does so, an action cannot be maintained against it for the price.[48]

[45] Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Smith's Cas. 557, 1 Cum. Cas. 152; Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Smith's Cas. 465, 1 Cum. Cas. 164; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261; Mallory v. Hanaur Oil Works, 86 Tenn. 598, 1 Keener's Cas. 678; Bowman Dairy Co. v. Mooney, 41 Mo. App. 665. And see McCutcheon v. Merz Capsule Co., 37 U. S. App. 586, 1 Smith's Cas. 503; Memphis & Charleston R. Co. v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69; Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co., 70 Miss. 669, 35 Am. St. Rep. 681. See infra, this section, (e), (i).

[46] Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Smith's Cas. 491, 1 Cum. Cas. 291. And see Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co., 70 Miss. 669, 35 Am. St. Rep. 681.

[47] Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425, 1 Keener's Cas. 689, 1 Cum. Cas. 393; Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Smith's Cas. 148, 1 Cum. Cas. 148; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261. See note 46.

[48] Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Smith's Cas. 148, 1 Cum. Cas. 148.

The same rule applies where an *ultra vires* executory contract by a corporation to purchase real or personal property is repudiated by the other party. The corporation cannot maintain an action for breach or for specific performance.[49] A corporation cannot maintain an action on a bond for the conveyance of land to it, where it has no power to purchase the land.[50]

Part performance.—As was stated above, this rule is not affected by the fact that the contract has been partly performed by both parties. In a Michigan case a corporation created for the purpose of manufacturing and selling carriages entered into a contract for the purchase of a large quantity of excelsior, not for use in its manufacturing business, but for the purpose of selling the same as a speculation. After part of the excelsior had been delivered, the other party refused to deliver more, and sued for the value of what had been delivered. It was held that the plaintiff was entitled to recover, and that the corporation could not recoup damages for breach of the contract in refusing to deliver the residue.[51]

(f) Sale of property.—Where a corporation has entered into an *ultra vires* contract to sell and deliver property, real or personal, either party may repudiate the contract before it is executed, and neither can maintain an action for breach or for specific performance.[52]

(g) Transaction through commission merchant or broker.—In a New York case a savings bank and trust corporation undertook, *ultra vires,* to engage in purchasing and selling cotton for future delivery, and employed the plaintiffs, who were commission merchants and members of the cotton exchange, to act for them. The plaintiffs made purchases and sales in

[49] Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425, 1 Keener's Cas. 689, 1 Cum. Cas. 393; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14, 1 Smith's Cas. 497, 1 Keener's Cas. 781, 1 Cum. Cas. 293; Wilks v. Georgia Pacific R. Co., 79 Ala. 180; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369.

[50] Coleman v. San Rafael Turnpike Road Co., 49 Cal. 517.

[51] Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261.

[52] Copper Miners' Co. v. Fox, 16 Q. B. 229; Simmons v. Troy Iron Works, 92 Ala. 427; Bank of Michigan v. Niles, Walk. (Mich.) 99, 1 Smith's Cas. 493, 1 Doug. (Mich.)

their own names, and afterwards brought an action against the corporation to recover commissions and for money expended. It was held that, as there had been no delivery of any cotton or property of any kind, nor the transfer of the title to any property to the corporation, the contract was executory, and that the action, therefore, could not be maintained.[53]

(h) **Purchase of or subscription for shares of stock.**—Where a subscription by a corporation for shares of stock in another corporation, or a contract to purchase shares of stock in another corporation, or shares of its own stock, is *ultra vires*,[54] and is wholly executory, no action will lie against the corporation, either at law or in equity, to enforce the contract or to recover damages for its breach.[55] Nor will an action lie by the corporation to enforce such a contract. Thus in a New York case, where a banking corporation entered into an *ultra vires* contract with a person, under which the latter agreed to subscribe for shares of stock in another corporation in part for and on account of the bank, and he subscribed for the stock in his own name, it was held that, as the contract was executory, the bank could not maintain an action to compel him to transfer shares to it or account for them, in accordance with the contract.[56]

(i) **Leases.**—An *ultra vires* covenant by a corporation, as a railroad company, for example, to make or take a lease, so long as it is executory, is absolutely void, and an action will not lie to recover damages for its breach or to compel specific performance.[57] And even when a lease has been made, if it is

401, 41 Am. Dec. 575, 1 Cum. Cas. 291.

[53] Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 19 Am. St. Rep. 482, 1 Smith's Cas. 500, 1 Keener's Cas. 819.

[54] Ante, §§ 193 et seq., 199 et seq.

[55] Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425, 1 Keener's Cas. 689, 1 Cum. Cas. 393; Trevor v. Whitworth, 12 App. Cas. 409, 1 Keener's Cas. 694, 1 Smith's Cas. 977, 1 Cum. Cas. 384; New Orleans, F. & H. Steamship Co. v. Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90.

[56] Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14, 1 Smith's Cas. 497, 1 Keener's Cas. 781, 1 Cum. Cas. 293.

[57] East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142.

ultra vires and executory, an action will not lie for breach of covenants therein.[58]

—**Part performance.**—The fact that the lease has been partly carried out by both parties does not change this rule. In a leading case in the supreme court of the United States a railroad company made an *ultra vires* lease of its road for twenty years and covenanted to pay the lessees any damage or loss, to be determined by arbitrators, which they might sustain in case it should terminate the lease before the expiration of such time. The lease was performed by both parties for several years, and then terminated by the company. It was held, notwithstanding such part performance, that the lessee could not maintain an action on the covenant to arbitrate and pay damages. "What is sought in the case before us," said Mr. Justice Miller, "is the enforcement of the unexecuted part of this agreement. So far as it has been executed, * * * the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for. * * * It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its nonperformance. As to this it is not an executed contract."[59]

(j) **Employment of agent or servant.**—Where a corporation employes an agent or servant in carrying on an *ultra vires* business, either may terminate the contract at any time, and the other cannot maintain an action for damages or specific performance.[60]

[58] Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Smith's Cas. 465, 1 Cum. Cas. 164. And see Pennsylvania R. Co. v. St. Louis, Alton & T. H. R. Co., 118 U. S. 290; St. Louis, Vandalia & T. H. R. Co. v. Terre Haute & Indianapolis R. Co., 145 U. S. 393, 1 Keener's Cas. 773, 1 Smith's Cas. 472, 2 Cum. Cas. 78; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1. And see Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 1 Smith's Cas. 514, 1 Keener's Cas. 641. Compare Heims Brewing Co. v. Flannery, 137 Ill. 309.

[59] Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Smith's Cas. 465, 1 Cum. Cas. 164. And see Memphis & Charleston R. Co. v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69.

[60] Bowman Dairy Co. v. Mooney, 41 Mo. App. 665.

(k) Partnership.—In so far as an *ultra vires* contract of partnership between corporations is executory, even though it may have been partly performed, it may be repudiated or rescinded by either party, and either may recover its property from a committee to which it has been delivered under the partnership agreement.[61]

(l) Suretyship and guaranty.—An action cannot be maintained against a corporation on a contract of suretyship or guaranty which is clearly beyond the powers conferred upon it by its charter.*

(m) Action for rescission or cancellation of contracts.—We have seen that, when an *ultra vires* contract has been fully performed, neither party can maintain an action, either at law or in equity, to rescind the same and recover what has been parted with, but the courts will leave the parties where they have placed themselves.[62]

The rule is otherwise, however, when an *ultra vires* contract remains wholly executory on both sides, or has been executed only in part on both sides. In a late case in the circuit court of appeals, several manufacturing corporations and partnerships entered into an *ultra vires* agreement for the combination and consolidation of their several properties and business interests by the organization of a new corporation, the stock in which was to be divided between them, and to which they were to convey their machinery and other property and receive in payment bonds secured by a mortgage. After the new corporation was formed and its stock was divided between the parties to the agreement, and bills of sale and conveyances executed by them to it, but before the new corporation had executed the bonds and mortgage, one of the corporations, being still in possession of its property repudiated the agreement, and brought a suit to cancel the same and the conveyance and bills

[61] Mallory v. Hanaur Oil Works, 86 Tenn. 598, 1 Keener's Cas. 678.

* Lucas v. White Line Transfer Co., 70 Iowa, 541, 1 Keener's Cas. 460; Best Brewing Co. v. Klassen, 185 Ill. 37, 7[illegible] Am. [illegible]t. Rep. 26; Louisville, New Albany & C. R. Co. v. Louisville Trust Co., 174 U. S. 52. And see ante, § 184, and cases there cited.

[62] Ante, § 212.

of sale executed by it, and to enjoin the new corporation and its officers and agents from forcibly taking possession of its property under the same. Under this condition of things it was held that, as the agreement had not been fully executed, the relief prayed for should be granted.[63]

§ 214. Contracts executed on one side.

(a) View that an action will not lie on the contract—(1) In general.—There is a direct conflict of opinion as to whether, when an *ultra vires* contract with a corporation has been fully performed on one side, the party on whose side it has been performed may maintain an action against the other on the contract, or whether the sole remedy, if any, is *quasi ex contractu,* in disaffirmance of the contract, to recover money paid under it, or the value of property delivered or services rendered.

Some of the courts, including the house of lords in England, the supreme court of the United States, and the supreme courts of Alabama, Massachusetts, Tennessee, and several other states, have held that a contract with a corporation which is beyond its powers, or *ultra vires,* though it may not be otherwise illegal, is absolutely void, on the ground that a corporation, by reason of its limited powers, is incapable of making such a contract; that the fact that the contract has been executed by one of the parties, and the other has thus received the consideration for his or its promise, cannot give the contract any validity; that such performance by one of the parties, and receipt of the consideration by the other, does not estop the latter from setting up that the contract is *ultra vires,* since all persons are chargeable with knowledge of the powers of a corporation; and that no action, therefore, will lie on the contract itself by the party on whose part it has been executed, the only remedy, if there is any remedy at all, being *quasi ex contractu,* in disaffirmance of the contract and on an implied contract, to recover the money paid

[63] McCutcheon v. Merz Capsule Co., 37 U. S. App. 586, 1 Smith's Cas. 503. See, also, Mallory v. Hanaur Oil Works, 86 Tenn. 598, 1 Keener's Cas. 678; Memphis & Charleston R. Co. v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69.

or loaned, or the value of the property delivered or services rendered under the contract. This doctrine is applied in these jurisdictions both where the contract is fully performed by the corporation and the action is brought by it,[64] and where it is fully performed by the other party and the action is brought against the corporation.[65]

If the doctrine of estoppel be established in this connection, said the Alabama court, "then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature have withheld."[66]

——Doctrine as stated in the supreme court of the United States. —In a leading case on this question in the supreme court of the

[64] Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44; Pittsburgh, Cincinnati & St. Louis R. Co. v. Keokuk & Hamilton Bridge Co., 131 U. S. 371; Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71, 1 Smith's Cas. 511, 1 Keener's Cas. 794; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 1 Smith's Cas. 514, 1 Keener's Cas. 641; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Smith's Cas. 590, 1 Cum. Cas. 245 (but see note 79, infra); Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695; Simpson v. Building & Savings Ass'n, 38 Ohio St. 349.

[65] Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Smith's Cas. 557, 1 Cum. Cas. 152; Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Smith's Cas. 564, 1 Keener's Cas. 457, 1 Cum. Cas. 173; Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Smith's Cas. 148, 1 Cum. Cas. 148; Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Keener's Cas. 504; Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co., 70 Miss. 669, 35 Am. St. Rep. 681; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 1 Smith's Cas. 514, 1 Keener's Cas. 641; Bowen v. Needles Nat. Bank (C. C. A.) 94 Fed. 925; Louisville, New Albany & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552; Chewacla Lime Works v. Dismukes, 87 Ala. 344, 1 Keener's Cas. 469; National Home Building & Loan Ass'n v. Home Savings Bank, 181 Ill. 35, 72 Am. St. Rep. 245; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26; Durkee v. People, 155 Ill. 354, 46 Am. St. Rep. 340.

See, also, In re Phoenix Life Assurance Co., 2 Johns. & H. 441; Andrews v. Union Mutual Fire Ins. Co., 37 Me. 257; Norton v. Derry Nat. Bank, 61 N. H. 592; Miller v. American Mutual Accident Ins. Co., 92 Tenn. 167.

As to Illinois, however, see note 79, infra.

[66] City Council of Montgomery v. Montgomery & Wetumpka Plank Road Co., 31 Ala. 76.

United States it was said by Mr. Justice Gray: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law." It was further said in the same case: "A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract, is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws. * * * A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any

action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done, consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."[67]

——(2) **Purchase of stock in another corporation.**—This doctrine was applied in a late Tennessee case where a corporation had made an *ultra vires* purchase of shares of stock in another corporation, and the shares had been paid for by it, and transferred to a trustee named by it. As part of the contract the seller had agreed to pay off certain liabilities of the other corporation, but he failed to do so, and the purchasing corporation, having been compelled to pay them, brought an action against him on the contract. It was held that the action could not be maintained, even though the contract had been fully performed by the corporation. "The suit," said the court, "is clearly in furtherance of the original, unlawful, and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it."[68]

——(3) **Leases—Action for rent.**—It has also been held, in accordance with this doctrine, that a railroad company or other

[67] Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44. See, also, Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Keokuk & Hamilton Bridge Co., 131 U. S. 371; Pennsylvania R. Co. v. St. Louis, Alton & T. H. R. Co., 118 U. S. 317.

[68] Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71, 1 Smith's Cas. 511, 1 Keener's Cas. 794.

And in a Maine case it was held that an ultra vires contract by a corporation to take and pay for stock in another corporation could not be enforced against the corporation merely because it had been executed by the other party, where no benefit had been received by the corporation upon which a quantum meruit or quantum valebat could be sustained. Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Keener's Cas. 504, 1 Cum. Cas. 343.

corporation cannot maintain an action for rent under an *ultra vires* lease made by it, though the contract has been performed by it and the lessee has had the benefit of the lease.[69]

——(4) **Purchase or sale of goods.**—And it has been held that a corporation which has entered into an *ultra vires* contract to purchase goods, though it has paid money under the contract, cannot maintain an action to recover damages for the other party's failure to deliver the goods.[70] Where a corporation made an *ultra vires* purchase of a steamboat to be run in connection with its road, and gave its notes therefor, it was held that an action could not be maintained on the notes, though it had received and used the boat.[71] And it has been held that the fact that an *ultra vires* contract by a corporation to purchase property to be manufactured for it is executed by the other party to the extent of manufacturing and tendering the property will not entitle him to maintain an action against it for the price.[72]

——(5) **Contracts for services.**—The doctrine has also been applied to contracts for services. Thus, where a railroad company employed a person in an *ultra vires* transaction,—to examine and report upon mines of which its road was the outlet,—it was held that he could not maintain an action against the corporation for his compensation.[73]

[69] Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 1 Keener's Cas. 618, 2 Cum. Cas. 44; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 1 Smith's Cas. 514, 1 Keener's Cas. 641.

And see Pennsylvania R. Co. v. St. Louis, Alton & T. H. R. Co., 118 U. S. 290; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1; St. Louis, Vandalia & T. H. R. Co. v. Terre Haute & Indianapolis R. Co., 145 U. S. 393, 2 Cum. Cas. 78, 1 Smith's Cas. 472.

[70] Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Smith's Cas. 590, 1 Cum. Cas. 245.

[71] Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146. And see Chewacla Lime Works v. Dismukes, 87 Ala. 344, 1 Keener's Cas. 469.

It appeared in the case first cited that the holder had notice of the circumstances under which the notes were given. The decision would no doubt have been different if he had been a bona fide purchaser without notice. See post, § 217.

The plaintiff could have sued quasi ex contractu for the value of the boat. See post, § 215(b).

[72] Downing v. Mt. Washington Road Co., 40 N. H. 230, 1 Smith's Cas. 148, 1 Cum. Cas. 148.

[73] George v. Nevada Cent. R. Co., 22 Nev. 228.

——(6) **Insurance.**—It has also been held that an insurance company, authorized by its charter to insure against certain risks, is not liable on an *ultra vires* policy insuring against other risks, though it has received the premiums; the only remedy of the insured in such a case being an action to recover the premiums paid by him.[74]

——(7) **Subscriptions to other enterprises.**—The doctrine has also been applied to an *ultra vires* subscription by a corporation in aid of other enterprises. Thus, where a corporation agreed to pay a certain amount towards defraying the expenses of a festival in the city in which it was located, it was held that no action would lie on its subscription, though the festival was held and expenses incurred thereby, and though the corporation received the benefit of the contract in an increase of its business and profits.[75]

——(8) **Guaranty.**—In a leading Massachusetts case it was held that an action could not be maintained against a corporation on an *ultra vires* contract by which it guarantied payment of a certain proportion of any deficiency to defraying the expenses of a musical festival to be held in the city in which it was located, though the festival was held and expenses incurred in reliance on the guaranty.[76] It has also been held that a corporation is not liable on a guaranty by it of a certain dividend on the stock of another corporation made to induce a person to subscribe to such stock.[77]

[74] In re Phoenix Life Assurance Co., 2 Johns. & H. 441; Andrews v. Union Mutual Fire Ins. Co., 37 Me. 257; Miller v. American Mutual Accident Ins. Co., 92 Tenn. 167. Compare post, § 214(b)(6).

[75] Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Keener's Cas. 457, 1 Smith's Cas. 564, 1 Cum. Cas. 173.

See, also, ante, § 184.

[76] Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Smith's Cas. 564, 1 Keener's Cas. 457, 1 Cum. Cas. 173.

[77] Memphis Grain & Package Elevator Co. v. Memphis & Charleston R. Co., 85 Tenn. 703.

In Louisville, New Albany & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, a railroad company's guaranty of the bonds of another railroad company was held absolutely void.

For other cases in which liability on a guaranty has been denied, see Norton v. Derry Nat. Bank, 61 N. H. 592; Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co., 7 Wis. 59.

(b) View that an action will lie on the contract—(1) In general.—The strict doctrine applied in the cases above referred to—that an action will not lie on an *ultra vires* contract even when it has been fully executed on one side—is not recognized in all jurisdictions. On the contrary, many courts have repudiated it. In New York, Pennsylvania, Wisconsin, New Jersey, and several other states it has been held that when a contract with a corporation which is merely *ultra vires,* and not otherwise illegal either because of its being expressly prohibited or because of its being contrary to public policy, has been fully executed by one of the parties, so that the other party has received the consideration for his or its promise, either in money, property, or services, the party on whose part the contract has been executed may maintain an action upon it, and the other party cannot defeat the action by pleading that the contract is *ultra vires.* It has been so held both in actions by the corporation,[78] and in actions by the other party against the corporation.[79]

[78] Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 1 Cum. Cas. 253; Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 1 Keener's Cas. 799; Bond v. Terrell Cotton & Woolen Mfg. Co., 82 Tex. 309, 1 Smith's Cas. 507; Steam Nav. Co. v. Weed, 17 Barb. (N. Y.) 378, 2 Cum. Cas. 55; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Keener's Cas. 762, 1 Cum. Cas. 261; Camden & Atlantic R. Co. v. May's Landing & Egg Harbor City R. Co., 48 N. J. Law, 530, 1 Keener's Cas. 787; Macon & Augusta R. Co. v. Georgia R. Co., 63 Ga. 103; Poock v. Lafayette Bldg. Ass'n, 71 Ind. 357; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Hall Mfg. Co. v. American Railway Supply Co., 48 Mich. 331; Franklin Ave. German Sav. Inst. v. Board of Education, Town of Roscoe, 75 Mo. 408.

[79] Bissell v. Michigan Southern & Northern Indiana R. Cos., 2 N. Y. 258, 1 Smith's Cas. 522, 1 Cum. Cas. 187; Camden & Atlantic R. Co. v. May's Landing & Egg Harbor City R. Co., 48 N. J. Law, 530, 1 Keener's Cas. 787; Wright v. Pipe Line Co., 101 Pa. St. 204, 1 Keener's Cas. 508; Boyd v. American Carbon Black Co., 182 Pa. St. 206, 1 Keener's Cas. 777; Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 1 Smith's Cas. 568, 1 Cum. Cas. 227; State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407, 17 Am. Rep. 702, 1 Cum. Cas. 222; Louisville, New Albany & C. Ry. Co. v. Flanagan, 113 Ind. 488; Underwood v. Newport Lyceum, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260; Dewey v. Toledo, Ann Arbor & N. M. Ry. Co., 91 Mich. 351; Carson City Sav. Bank v. Carson City Elevator Co., 90 Mich. 550, 30 Am. St. Rep. 454; Prairie Lodge, No. 87, A. F. & A. M., v. Smith, 58 Miss. 301; Woodruff v. Erie Ry. Co., 93 N. Y. 609; Oil Creek & Allegheny River R. Co. v. Pennsylvania Transp. Co., 83 Pa. St. 160; Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110; Wright v. Hughes, 119 Ind. 324, 12 Am. St.

These courts proceed on the theory that a contract with a corporation which is merely *ultra vires,* or beyond the powers conferred upon it by its charter, is neither *malum in se* nor *malum prohibitum,* so as to be illegal in the sense of the maxim, *ex dolo malo non oritur actio,* and that public policy, as well

Rep. 412; G. F. Wittmer Lumber Co. v. Rice, 23 Ind. App. 586; Butterworth & Lowe v. Kritzer Milling Co., 115 Mich. 1; City of Goodland v. Bank of Darlington, 74 Mo. App. 365; International Trust Co. v. Davis & Farnum Mfg. Co. (N. H.) 46 Atl. 1054; Chapman v. Iron Clad Rheostat Co., 62 N. J. Law, 497; Parish v. Wheeler, 22 N. Y. 494; Linkauf v. Lombard, 137 N. Y. 417, 33 Am. St. Rep. 743; Milborne v. Royal Benefit Soc., 14 App. Div. (N. Y.) 406; Union Trust Co. v. Mercantile Library Hall Co., 189 Pa. St. 263; McElroy v. Minnesota Percheron Horse Co., 96 Wis. 317; Hubbard v. Haley, 96 Wis. 578; Bear River Valley Orchard Co. v. Hanley, 15 Utah, 506.

In Oil Creek & Allegheny River R. Co. v. Pennsylvania Transp. Co., 83 Pa. St. 160, a railroad company agreed to pay an oil pipe-line company a certain sum per barrel on all oil transported by it, in consideration of a promise by the pipe-line company to deliver to it for transportation all the oil under its control. It was held that, after the pipe-line company had performed its part of the agreement, the railroad company could not defeat an action for the money due by setting up that the agreement was ultra vires.

In McElroy v. Minnesota Percheron Horse Co., 96 Wis. 317, it was held that a corporation could not avoid a contract of agency on the ground that it was ultra vires, after it had been fully executed on the part of the agent.

In City of Goodland v. Bank of Darlington, 74 Mo. App. 365, it was held that a corporation could not set up that its subscription for stock in another corporation was ultra vires, where the contract was fully executed by the latter.

The earlier cases in Illinois were apparently in accord with this doctrine. See Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656, 1 Cum. Cas. 249; Darst v. Gale, 83 Ill. 137; Ward v. Johnson, 95 Ill. 215. In the later cases, however, the court has adopted the doctrine held by the supreme court of the United States and some of the other courts (supra, this section [a]), that where a contract is ultra vires in the strict sense, being of a sort into which the corporation absolutely lacks the power to enter, it cannot become binding by way of estoppel because the corporation has received the benefits under it, or the consideration, and has held that such a contract is absolutely void, and no action will lie upon it. National Home Building & Loan Ass'n v. Home Savings Bank, 181 Ill. 35, 72 Am. St. Rep. 245; Durkee v. People, 155 Ill. 354, 46 Am. St. Rep. 340; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26.

It is not an easy matter, if it is possible at all, to reconcile the cases last cited, and the dicta therein, with some of the other late cases in Illinois, which seem to adhere to the earlier doctrine. In Eckman v. Chicago, Burlington & Q. R. Co., 169 Ill. 312, it was said: "It is a general rule that a corporation cannot avail itself of the defense of ultra vires where a contract, not immoral in itself nor forbidden by any statute, has been in good faith fully performed by the other party and the corporation has had the full benefit of its performance. And this rule applies with equal force to the

as equity and justice, require that a party who has entered into such a contract with a corporation, and received the benefit of full performance by the corporation, or the corporation after receiving the benefit of performance by the other party, shall be held to be estopped to set up the *ultra vires* character of the contract in order to escape liability upon it.[80] The defense of *ultra vires,* said the New York court, "should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong."[81]

other party setting up that the contract was ultra vires of the company." And it was held in this case that an employe of a railroad company, after accepting benefits for an accident from the fund of the relief department of the company, organized and managed by it, could not attack as ultra vires the organization of the relief department by the company, or his contract of membership therein, by which he agreed that the acceptance of benefits for an injury should release any claim against the company on account of the injury. See, also, McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203; Kadish v. Garden City Equitable Loan & Building Ass'n, 151 Ill. 531, 42 Am. St. Rep. 256; Brewer & Hoffman Brewing Co. v. Boddie, 80 Ill. App. 353, 181 Ill. 622.

[80] See the cases cited in the preceding note.

In a late New York case (Chapman v. Lynch, 156 N. Y. 551, 1 Keener's Cas. 768) it was held that where a contract under which a corporation receives a deposit and promises to repay the same on demand is ultra vires, the statute of limitations against an action to recover the deposit begins to run from the time the deposit is received. This decision, however, seems clearly to be inconsistent with the doctrine, well established in that state, that when a contract with a corporation is fully executed by the other party by the payment of money or delivery of property, leaving nothing but a promise by the corporation to pay money, the corporation, when sued on its promise, is estopped to set up that the contract was ultra vires.

[81] Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 1 Cum. Cas. 253.

See, also, Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; Carson City Savings Bank v. Carson City Elevator Co., 90 Mich. 550, 30 Am. St. Rep. 454; Linkauf v. Lombard, 137 N. Y. 417, 33 Am. St. Rep. 743; Bear River Valley Orchard Co. v. Hanley, 15 Utah, 506.

In an Indiana case it was said: "Where a corporation makes a contract that is in excess of its chartered powers, it may well be that while the agreement remains wholly executory it cannot be enforced. So long as the contract is unexecuted it does not estop the corporation, because the power of a corporation, like that of a person under a legal disability, cannot be enlarged by the mere form of a contract which it had no capacity to make. The doctrine of ultra vires may be appealed to in such a case to resist the enforcement of a contract. It would be carrying that doctrine to an unwarranted extent, however, to hold that a corporation might obtain the money of another, and, with the fruits of the contract in its treas-

In a late New Jersey case, in which it was held that an action would lie against a corporation for rent due under an *ultra vires* lease, it was said by Judge Van Syckel: "In the conflict of judicial decision on this subject, this court may adopt and should adopt the rule which will produce the best results in the administration of justice. In my judgment the true rule is that when the transaction is complete, and the party seeking relief has performed on his part, the plea of *ultra vires* by the corporation, which has acquiesced in it, is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot, upon rescission, be restored to his former status. * * * The underlying principle is that the corporation cannot set up its own infirmity when it is unconscionable to do so. The law forbids the defense on account of the flagrant injustice which would otherwise be done. The question of corporate power is not entertained. To enable recompense to be had to this extent, the contracts are respected, not that they rest in authority, but because good conscience requires it."[82]

ury, interpose the defense of ultra vires, or, having used the money with the consent or acquiescence of its stockholders, ask that the lender be restrained from collecting it back, on the ground that the money was obtained in violation of the charter of the corporation. Like natural persons, corporations must be held to the observance of the recognized principles of common honesty and good faith, and these principles render the doctrine of ultra vires unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud. After a corporation has received the fruits which grow out of the performance of an act ultra vires, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract, in order to escape the performance of an obligation it has assumed. The most that can be said in the present case is, that there was a defect of power to engage in the transaction in which the money borrowed was used. The power to borrow money was plenary, and subject to no restrictions. In such a case, although the lender may know that it is the purpose of the borrower to use the money in an irregular way, yet if the contract between the lender and borrower is not in violation of law, or declared void by statute, the money may be recovered, unless the lender was in some way implicated in furthering the borrower's design, or accessory to the prohibited or illegal act." Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412.

[82] Camden & Atlantic R. Co. v. May's Landing & Egg Harbor City R. Co., 48 N. J. Law, 530, 1 Keener's Cas. 787.

In a late Colorado case, in which it was held that a fire insurance company could not defeat an action against it on a policy insuring the plaintiff against loss of crops by hail, by setting up that the contract was *ultra vires,* it was said:

"It is argued on behalf of the appellant that the courts ought in all such cases to sustain the defense of *ultra vires,* here interposed, on the ground of public policy; that the public which confers the corporate powers upon such companies has an interest in the protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized limits, and this is given in the books as the chief reason for the rule of decision in the cases which sustain the defense of *ultra vires.* That the public has such an interest is quite true, but whether to afford such protection the defense of *ultra vires* is always necessary in such cases is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection, is that with whom these multiform corporations deal in the daily exercise of their assumed powers. And it seems illogical to assume that the interests of the public would be best subserved by a public policy which would allow a corporation, any more than an individual, to violate the principles of common honesty and claim exemption from the obligation of its contracts by pleading its own wrong-doing. Such policy would rather seem to offer a premium for dishonest dealing. Besides, both the state which grants these corporate powers, and the stockholders for whose benefit such powers are exercised, have their remedies, the former by interfering to revoke the charter, and the latter by an action to restrain the unauthorized undertakings. While courts are inclined to maintain with vigor the limitations of corporate actions, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires,* of which they have received the benefit. If the other party proceeds to the performance of the contract, expending his money and labor

in the production of values, which the corporation appropriates, such corporation will not be excused on the plea that the contract was beyond its powers. * * * Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpe*. But where the act is not wrong *per se*, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be sent up to exempt from liability the party so pleading it. * * *

"The point was strongly insisted upon by counsel for appellant in argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract. While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character. Every one may have access to the statutes of the states affecting companies incorporated thereunder, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous. * * *

"It was urged in argument on behalf of appellant that the state which created these corporations for public good, has such an interest in their existence and perpetuity that public policy should be interposed to keep them within the legitimate exercise of their powers. This may be true to a certain extent, and the state may interpose to revoke their charters for an abuse there-

of; but we take it that it is no more the public policy of the state to protect the business of private corporations than that of its individual citizens; and to invoke public policy in a case like the one at bar, in order to prevent a corporation from doing wrong, by punishing the other party, would differ little from asking a court, on the ground of public policy, to prevent the obtaining money or goods through false pretenses by holding that the party defrauded should be punished by the loss of his money or goods. * * *

"If a private corporation has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defense of *ultra vires* may be disallowed. This, however, does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties contracting with it; the corporation, having received and retained the benefit of the contract, is denied the privilege of invoking the illegality of its act, and thus avoiding consequences naturally flowing therefrom.[83]

——**(2) Sale of goods—Contract for services.**—According to this doctrine, it has been held that a person who has purchased and received goods or contracted for services from a corporation cannot defeat an action by the corporation for the price by setting up that it was *ultra vires* for it to deal in or sell the goods, or to render the services.[84] And on the other hand, it has been

[83] Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 1 Cum. Cas. 227, 1 Smith's Cas 568.

[84] Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 1 Cum. Cas. 253. "A purchaser," said the court in this case, "who acquires by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase price by impeaching the right of the corporation to become the

held that a corporation cannot set up the defense of *ultra vires* to defeat an action against it on its promise to pay for goods sold and delivered to it,[85] or services rendered.[86]

—**(3) Loans by corporation.**—It has also been held that a person who has borrowed money from a corporation, and given his note or other express promise therefor, cannot defeat an action by the corporation on the note or other promise by setting up that it had no power under its charter to make the loan.[87]

owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was ultra vires, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation." See, also, Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85.

[85] Dewey v. Toledo, Ann Arbor & N. M. Ry. Co., 91 Mich. 351; Carson City Sav. Bank v. Carson City Elevator Co., 90 Mich. 550, 30 Am. St. Rep. 454; Underwood v. Newport Lyceum, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260; Wright v. Pipe Line Co., 101 Pa. St. 204, 1 Keener's Cas. 508.

In Wright v. Pipe Line Co., supra, it was held that a corporation could not set up the plea of ultra vires to defeat an action on a note given by it for stock in another corporation after it had received the stock.

Where a corporation entered into an ultra vires contract with a commission merchant and member of the cotton exchange for the purchase and sale of cotton by the latter on its account on speculation, and the latter purchased and sold cotton in his own name, without any delivery or transfer of title to the corporation, it was held that there was no such executed contract as to estop the corporation from setting up the defense of ultra vires in an action against it to recover commissions and for money expended. Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 19 Am. St. Rep. 482, 1 Keener's Cas. 819, 1 Smith's Cas. 500.

[86] Schurr v. New York & Brooklyn Suburban Inv. Co., 18 N. Y. Supp. 454.

[87] Bond v. Terrell Cotton & Woolen Mfg. Co., 82 Tex. 309, 1 Smith's Cas. 507; Steam Nav. Co. v. Weed, 17 Barb. (N. Y.) 378, 2 Cum. Cas. 55; Poock v. Lafayette Bldg. Ass'n, 71 Ind. 357; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Mutual Life Ins. Co. v. Wilcox, 8 Biss. 203, Fed. Cas. No. 9,980; Southern Life Insurance & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

But it was held in a late Indiana case that a person entering into the relation of borrowing member of a building and loan association with a corporation not authorized to conduct such business was not estopped to deny that his contract imposed upon him no other obligation than that of returning the sum borrowed, with interest, as the contract was void. Huter v. Union Trust Co. (Ind.) 51 N. E. 1071.

A corporation which acquires negotiable bonds as collateral security for a loan made by it, under circumstances which, if it were an individual, would constitute it a bona fide holder of the bonds, is a bona fide holder, and entitled to re-

—(4) **Borrowing money—Deposits—Securities.**—And it has been held that a corporation which has borrowed money without authority, or for use, to the knowledge of the lender, in an *ultra vires* business, and given its note or bonds therefor, or other security, cannot avoid liability on its contract because of the *ultra vires* character of the transaction.[88] In an Illinois case, where a banking corporation had created an investment department, and executed a deed of trust to secure lenders or depositors, it was held that after receiving loans and deposits on the faith of the security, which went into its general business, it could not defeat the deed of trust by setting up that the business was *ultra vires*.[89]

—(5) **Leases.**—It has also been held that the fact that a lease of its property by a corporation is *ultra vires* cannot be set up by the lessee, where he has occupied the premises under the lease, to defeat an action by the corporation to recover the rent agreed upon for the period of such occupancy;[90] and that a

cover as such, although its charter may not have authorized it to loan money. St. Paul Gas Light Co. v. Village of Sandstone, 73 Minn. 225.

[88] Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656, 1 Cum. Cas. 249; Darst v. Gale, 83 Ill. 137; Ward v. Johnson, 95 Ill. 215; Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; Union Trust Co. v. Mercantile Library Hall Co., 189 Pa. St. 263; International Trust Co. v. Davis & Farnum Mfg. Co. (N. H.) 46 Atl. 1054.

Neither a corporation nor its creditors can attack bonds issued by the corporation as ultra vires, because of the amount, where the corporation has received and retains the proceeds. International Trust Co. v. Davis & Farnum Mfg. Co. (N. H.) 46 Atl. 1054.

When a private corporation, without authority, becomes a stockholder in a building and loan association, and as such borrows money from it, a suit against it to enforce the security given for the loan cannot be defeated by setting up that its act in becoming a stockholder was ultra vires. Bowman v. Foster & Logan Hardware Co., 94 Fed. 592.

After having received the consideration, a corporation cannot defeat a mortgage given by it on the ground that it failed to comply with the statutory requirements in executing it. Campbell v. Argenta Gold & Silver Mining Co., 51 Fed. 1.

[89] Ward v. Johnson, 95 Ill. 215.

[90] Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 1 Keener's Cas. 799.

In a New York case it was held that the defense of ultra vires could not be interposed to defeat an action brought by a lessor corporation to enforce, to the extent of past-due rent and unpaid taxes, a bond executed to it by a lessee corporation and sureties to secure performance of the terms of the lease, where the lease was not malum in se, nor expressly prohibited by law, but merely not within the express or implied powers of the corporation, and where

corporation which has taken a lease in excess of its powers, and occupied the premises under it, cannot set up its want of power as a defense in an action against it for the rent due.[91]

——(6) **Insurance.**—In accordance with this view it was held in a Colorado case that an insurance company, after insuring against a risk which was not within the powers conferred upon it by its charter and receiving the premium on the policy, could not defeat an action on the policy by setting up that its contract was *ultra vires.*[92]

——(7) **Contracts of common carriers.**—And it has been held that a railroad company which engages in the business of carrying passengers and goods for hire in a way or over routes not authorized by its charter cannot, after contracting to carry and receiving the consideration, set up the *ultra vires* character of its contract to escape liability for injuries.[93]

——(8) **Subscriptions to other enterprises.**—In an Indiana case a street railroad company, to increase its business, contracted with the state board of agriculture to pay it a certain sum if it would establish and hold the state fairs at a certain place, and after the board had performed its part of the contract, claimed exemption from liability on the contract on the ground that it was *ultra vires.* The court held that the defense could not prevail, even though the action was on the contract itself, as the company had received the benefit of the board's performance of the contract.[94]

——(9) **Partnership.**—The doctrine that, where an *ultra vires*

the lessee had occupied the premises. Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 1 Keener's Cas. 799.

[91] Camden & Atlantic R. Co. v. May's Landing & Egg Harbor City R. Co., 48 N. J. Law, 530, 1 Keener's Cas. 787. And see Woodruff v. Erie Ry. Co., 93 N. Y. 609; Canal & Claiborne R. Co. v. St. Charles St. R. Co., 44 La. Ann. 1069; Brewer & Hoffman Brewing Co. v. Boddie, 80 Ill. App. 353.

[92] Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 1 Smith's Cas. 568, 1 Cum. Cas. 227. Compare ante, § 214(a) (6).

After an insurance company has assumed the risks of another company, and has accepted premiums from the insured, it cannot assert as against him that the contract with the other company was ultra vires. Milborne v. Royal Benefit Society, 14 App. Div. (N. Y.) 406.

[93] Bissell v. Michigan Southern & Northern Indiana R. Cos., 22 N. Y. 258, 1 Smith's Cas. 522, 1 Cum. Cas. 187. And see Linkauf v. Lombard, 137 N. Y. 417, 33 Am. St. Rep. 743.

[94] State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407,

contract with a corporation has been executed by one of the parties, the other may be estopped to set up the want of power to enter into the contract, has been applied to contracts of partnership. Thus, it has been held that where corporations have entered into an *ultra vires* copartnership, and have made a contract as partners, and have received the consideration for their promise, they cannot defeat an action against them as partners on the contract by setting up that the partnership business was *ultra vires*.[95]

It has also been held that while a contract of partnership between a corporation and an individual is *ultra vires* as to the corporation, yet if the contract has been executed, and the corporation has received the benefit of the same, it will be required in equity to account to the other party for what is due him under the contract.[96]

——**(10) Guaranty of suretyship.**—It has been held that a corporation cannot escape liability on a contract of guaranty or suretyship, after receiving the benefit of the contract, by setting up that it was *ultra vires*;[97] and, on the other hand, that a corporation which was entered into and performed an *ultra vires* contract of guaranty may enforce a mortgage given to secure or indemnify it.[98]

——**(11) Consolidation of railroad companies.**—The doctrine was applied in a New York case where two railroad companies had entered into a consolidation agreement without legislative

17 Am. Rep. 702, 1 Cum. Cas. 222. See, also, Louisville, New Albany & C. Ry. Co. v. Flanagan, 113 Ind. 488.

[95] Bissell v. Michigan Southern & Northern Indiana R. Cos., 22 N. Y. 258, 1 Smith's Cas. 522, 1 Cum. Cas. 187.

[96] Boyd v. American Carbon Black Co., 182 Pa. St. 206, 1 Keener's Cas. 777.

[97] Arkansas Valley Town & Land Co. v. Lincoln, 56 Kan. 145; Bradford, Eldred & C. R. Co. v. New York, Lake Erie & W. R. Co., 16 N. Y. St. Rep. 208.

Where a lumber company became surety on a bond given by a contractor for building a house to secure the payment of any mechanics' liens for materials, in consideration of the contractor's agreeing to purchase material from it, and had the benefit of the contract, it was held that it could not avoid the contract as ultra vires, and file a mechanics' lien for material furnished by it, for the building. G. F. Wittmer Lumber Co. v. Rice, 23 Ind. App. 586.

[98] Macon & Augusta R. Co. v. Georgia R. Co., 63 Ga. 103.

authority. It was held that after selling a ticket to a passenger, and receiving payment therefor, they could not escape liability for injury to him or his baggage on the ground that the consolidation and contract to carry were *ultra vires.*[99]

(c) Excess of power distinguished from want of power.—Some of the courts, in applying the doctrine of *ultra vires,* have made a distinction between contracts of a corporation which are *merely in excess* of the general powers of the corporation, and such as are *entirely beyond* its powers, and have held that no action can be maintained upon a contract falling within the latter class, although it may have been fully performed on one side, while, under such circumstances, an action may be maintained upon a contract falling within the former class. Thus, in a Mississippi case, where a loan was made by a corporation upon a note secured by a mortgage on land, when the corporation was not authorized to make loans except on notes with personal security, it was held that the *mortgage* was valid, and could be enforced, not merely on the ground that the corporation had furnished the consideration, and that the borrower was estopped to set up the defense of *ultra vires,* but on the ground that taking the mortgage was merely an excess of the corporation's general power to make the loan. The court said: "There was a loan irregularly made. The power to loan is conferred; the mode is regulated. If a corporation make a contract altogether outside of the purposes of its creation, it is void, because it has not power over the subject in reference to which it acts. But if it contracts with reference to a subject within its powers, but in doing so exceeds them, the person with whom it deals cannot set up such violation of its franchises to avoid the contract."*

[99] Bissell v. Michigan Southern & Northern Indiana R. Cos., 22 N. Y. 258, 1 Smith's Cas. 522, 1 Cum. Cas. 187.

*Littlewort v. Davis, 50 Miss. 403.

This distinction was also made in Rock River Bank v. Sherwood, 10 Wis. 230, where a bank took a note at twelve per cent. for a debt, when a statute authorized it to receive not exceeding ten per cent.; and in Germantown Farmers' Mutual Ins. Co. v. Dhein, 43 Wis. 420, 28 Am. Rep. 549, where a corporation exceeded its powers by loaning money for two years instead of one, and on a note and mortgage, instead of bond and mortgage.

The distinction has also been made in late cases in Illinois. In

Whether such a distinction as this is sound admits of very reasonable doubt. If a corporation is authorized to make a particular contract, and exceeds its power in this respect, it certainly acts without any power over the subject in so far as the excess is concerned. If it is authorized to make loans on personal security only, and it makes a loan on a real-estate mortgage, it certainly acts without power in taking the mortgage. The same is true where a corporation is authorized to borrow money or buy goods for the purposes of its legitimate business, and it borrows money or buys goods to be used in a business which it has no power to carry on. It may well be in such cases that the party—the corporation or the other party, as the case may be—should not be permitted to escape liability on the contract after receiving the benefit of it, as is held by many of the courts; but it is more reasonable to allow an action in such cases, if at all, on the ground that equitable principles require that the party who has received and retains the benefits of the contract should be held estopped to say that the contract was *ultra vires,* than to attempt to make a distinction, shadowy, to say the least, between want of power on the part of the corporation and mere excess of power,—an attempt which, even if the distinction is not altogether illogical, must result, and has resulted, in confusion and conflicting decisions. It seems absurd to say that a corporation which takes a mortgage to secure a loan, when its charter expressly declares that it shall have the

National Home Building & Loan Ass'n v. Home Savings Bank, 181 Ill. 35, 72 Am. St. Rep. 245, it was held that a building and loan association having power by its charter to raise money to be loaned to its members, and to purchase real estate on which it might have an incumbrance, and freely deal with and dispose of the same, had no power to invest its funds in real estate on which it had no lien, and in which it had no interest, and that, having made a contract for this purpose, it was not liable thereon, although it had received the benefits, since the contract was "ultra vires in the proper sense, being of a sort into which the corporation absolutely lacked the power to enter." It was said, on the other hand, that the rule would have been different if the corporation had merely exceeded its general powers, as by borrowing money or purchasing property for an unauthorized purpose, having a general power to borrow money and purchase property for accomplishing its legitimate objects,—citing to this effect, Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656, and other cases.

power to loan money on personal security only, acts, not without power, but merely in excess of power, in taking the mortgage. Making the loan is within the power of the corporation, but taking the mortgage is as entirely beyond its powers as if it were not authorized to make the loan at all.

It is submitted that the only logical way in which to treat *ultra vires* contracts, for the purpose of determining their effect, is to classify them into—

(1) Contracts executed on both sides, which, as we have seen, the courts will not set aside or interfere with for the purpose of depriving either party of what has been acquired under them.

(2) Contracts executory on both sides, which will not be enforced at the suit of either party, because their enforcement is not required by any equitable principle, and would be contrary to public policy.

(3) Contracts executed on one side, and executory on the other, which the courts in some jurisdictions, although not in all, will enforce in favor of the party who has executed the same on his part against the other party who has received and retains the benefits, on the ground that equitable principles, outweighing considerations of public policy, require that the latter should not be permitted, while retaining the benefits of the contract, to escape liability on the ground that it was *ultra vires*.

(4) Contracts, whether wholly executory or executed on one side, apparently authorized, but in fact *ultra vires* because made for a purpose not within the scope of the business of the corporation, or made without observing prescribed formalities, the *ultra vires* purpose, or the failure to observe the prescribed formalities, being unknown to the other party,—which contracts, as we shall presently see, are enforceable against the corporation.

(5) Contracts (which might be classified with those just mentioned) evidenced by a negotiable instrument, which, as we shall see, is valid and binding upon the corporation in the hands of a *bona fide* purchaser, the instrument being apparently within

the powers of the corporation, but having in fact been given for an *ultra vires* purpose, or in an *ultra vires* transaction.

(6) Contracts which are not only *ultra vires,* but also illegal, because in violation of an express statutory prohibition, or contrary to public policy, such contracts being void because of their illegality, aside from the fact that they are also *ultra vires,* on the same principles which render void illegal contracts between individuals.

Contracts falling within the three classes first mentioned have been considered in the preceding sections. Those falling within the other cases will be considered in subsequent sections.

§ 215. Obligation to restore what is received under an ultra vires contract and resulting remedies.

(a) In general.—It is a general principle, recognized both in equity and at law, that, when a corporation repudiates an *ultra vires* contract into which it has entered, there is an obligation to restore what it has received under the contract. And the same is true with respect to the other party to an *ultra vires* contract. This doctrine is not at all inconsistent with the doctrine which prevents enforcement of an *ultra vires* contract. "However the contractual power of a corporation may be limited under its charter," said the New Hampshire court in a late case, "there is no limitation of its power to make restitution to the other party whose money or property it has obtained through an unauthorized contract; nor, as a corporation, is it exempted from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial."[100]

(b) Action on implied contract—(1) In general.—The obligation

[100] Manchester & Lawrence R. Co., 66 N. H. 100. See, also, Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40, 1 Smith's Cas. 588; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Smith's Cas. 590, 1 Cum. Cas. 245; American Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 188, 1 Fed. 745, 1 Cum. Cas. 284, 1 Smith's Cas. 469; Bradley v. Ballard, 55 Ill. 413, 417, 8 Am. Rep. 656; Wilson's Case, L. R 12 Eq. 521. And see the cases more specifically cited in the notes following.

to restore property or money received under an *ultra vires* contract, on refusing to perform the same, is enforced when possible, even in courts of law, by allowing an action *quasi ex contractu* to be maintained. Even in those jurisdictions in which the doctrine of *ultra vires* is strictly applied, and in which it is held that the fact that an *ultra vires* contract with a corporation has been fully executed on one side by the payment of money, rendering of services, or transfer of property, will not render the other party liable on the contract, itself, the courts grant relief by allowing an action on implied contract for money had and received, or for the value of the property or services. Such an action is in disaffirmance of the *ultra vires* contract, and not to enforce the same.[101]

(2) Recovery of value of goods or services.—Thus, if a corporation enters into a contract which is merely *ultra vires,* and not immoral nor contrary to any express prohibition, and performs services or delivers goods or conveys land under the contract, the other party cannot set up the *ultra vires* character of the transaction to defeat an action by the corporation to recover the value of the services or of the land or goods, even in those jurisdictions in which no action can be maintained on the contract. As he has had the benefit of the transaction, the law will imply or create a contractual or *quasi* contractual obligation to pay.[102] In like manner, when a corporation is sued *quasi*

[101] Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40, 1 Smith's Cas. 588; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781; 1 Smith's Cas. 590; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261; Slater Woollen Co. v. Lamb, 143 Mass. 420, 1 Cum. Cas. 260; and cases more specifically cited in the notes following.

The fact that a contract by a national bank to receive and collect securities and reinvest the proceeds for the owner was ultra vires does not relieve the bank of the obligation to return the securities or account to the owner for their value. Emmerling v. First Nat. Bank of Pembina (C. C. A.) 97 Fed. 739.

[102] Slater Woollen Co. v. Lamb, 143 Mass. 420, 1 Cum. Cas. 260. And see Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 1 Smith's Cas. 514, 1 Keener's Cas. 641; Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128.

In Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 1 Keener's Cas. 815, it was held that where a corporation sells and delivers goods in pursuance of an ultra vires contract, but not under any mistake

ex contractu for the value of goods or land purchased and received by it, or for the value of services rendered for it under a contract, it cannot defeat a recovery by setting up that the contract was *ultra vires*.[103]

——**(3) Action for use and occupation.**—If a corporation uses another's property under an *ultra vires* lease to it, or if another uses the property of a corporation under an *ultra vires* lease by it, an action may be maintained to recover, on implied contract, the value of the use and occupation, even in those jurisdictions in which an action cannot be maintained for rent due under the lease.[104]

——**(4) Recovery of money paid or lent—(aa) Action by corporation.**—On the same principle, if a corporation pays money under a contract which is merely *ultra vires,* and not immoral or otherwise illegal, and the other party refuses to perform, it may recover the money in an action for money had and received. This is true, for example, where a corporation pays money in advance under an *ultra vires* contract for the purchase of goods, and the other party, while retaining the money, refuses to deliver the goods.[105] The same is true where a corporation loans or advances money upon securities upon which its charter does not authorize it to make loans or advances. It may recover the money in an action on implied contract for money had and received, or money lent.[106]

— —**(bb) Action against corporation.**—In like manner, if a corporation receives money under an *ultra vires* contract, and refuses to carry out the contract, the other party may maintain an

of fact, it cannot maintain an action to recover their value. But this decision cannot be sustained.

[103] Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 1 Cum. Cas. 261; Moore v. Swanton Tannery Co., 60 Vt. 459.

[104] See Manchester & Lawrence R. Co. v. Concord R. Co., 66 N. H. 100; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 1 Smith's Cas. 514, 1 Keener's Cas. 641.

[105] Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Smith's Cas. 590, 1 Cum. Cas. 245.

Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 1 Keener's Cas. 815, holds the contrary, but the decision is not sustained either by reason or authority.

[106] Allen v. Freedman's Savings & Trust Co., 14 Fla. 418.

Grand Lodge v. Waddill, 36 Ala. 313, to the contrary, cannot be sustained.

action against it for money had and received. It was so held in a Massachusetts case, where a corporation received a sum of money under an *ultra vires* contract, and promised to return the same if an additional sum should not be raised within a certain time.[107] Some courts hold that if money is borrowed by a corporation without authority, it is not liable on its contract to pay the same, but is liable, both at law and in equity, to the extent to which the money has been applied to legitimate corporate purposes.[108]

If a corporation issues and sells bonds which are void for want of power to issue them, the purchaser may maintain an action against it to recover the consideration paid.*

— —(cc) **Subrogation.**—In England it has been held in several cases that if a corporation borrows money when it has no power to do so, either because its nature is such that it cannot borrow at all, or because the amount which it is authorized to borrow is limited by its charter, and the money so borrowed is applied to the payment of valid debts of the corporation, whether contracted before or after the loan, the lender, or the holder of bonds issued for the loan, may recover from the corporation to the extent to which the money has been so applied. To this extent he is merely subrogated in equity to the rights of the creditors who have been paid, and there is no increase in the indebtedness of the corporation.[109] This rule only applies in so far as the money has been applied to the payment of valid debts of the corporation.[110]

[107] Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40, 1 Smith's Cas. 588.

[108] In re National Permanent Ben. Bldg. Soc., 5 Ch. App. 309, 1 Smith's Cas. 582, 1 Keener's Cas. 807, 1 Cum. Cas. 274; Wenlock v. River Dee Co., 19 Q. B. Div. 155, 1 Smith's Cas. 577, 1 Cum. Cas. 277; In re Cork & Youghal Ry. Co., 4 Ch. App. 748, 1 Cum. Cas. 265; Troup's Case, 29 Beav. 353; In re German Min. Co., 4 De Gex, M. & G. 19; Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 1 Keener's Cas. 656, 1 Cum. Cas. 326; Union Gold Min. Co. of Colorado v. Rocky Mountain Nat. Bank, 96 U. S. 640; Allis v. Jones, 45 Fed. 148; Allen v. Town of LaFayette, 89 Ala. 650; Parsons v. Inhabitants of Monmouth, 70 Me. 262.

* Paul v. City of Kenosha, 22 Wis. 266, 94 Am. Dec. 598.

[109] In re National Permanent Ben. Bldg. Soc., 5 Ch. App. 309, 1 Smith's Cas. 582, 1 Keener's Cas. 807, 1 Cum Cas. 274.

[110] In re Cork & Youghal Ry. Co., 4 Ch. App. 748, 1 Cum. Cas.

(c) Accounting in equity.—When, under an *ultra vires* contract with a corporation, one of the parties has received money or property to which the other is equitably entitled, a court of equity, if it has jurisdiction in the particular case, will compel an accounting. Thus, where railroad companies entered into a pooling contract, and the contract was carried out, and the profits therefrom collected and held by the receiver of one of the companies, a court of equity compelled him to account to the other company for its share.[111] Where a railroad company uses the roadbed, rolling stock, and equipments of another company under an *ultra vires* lease or other contract, it cannot defeat a suit in equity for an accounting and a return of the property on the ground that the contract was *ultra vires*.[112]

The same rule applies where a corporation enters into an *ultra vires* partnership agreement with an individual or another corporation. Either party may be compelled to account to the other for his or its share of the profits.[113] The rule has also been applied for the purpose of compelling a corporation to account for the value of land received by it under an *ultra vires* contract.[114]

(d) Restoration as a condition of rescission in equity.—The equitable doctrine which imposes upon a corporation which has entered into an *ultra vires* contract, or upon the other party to such a contract, as the case may be, the obligation to restore what it or he has received under the contract, on repudiating it, applies with peculiar force when affirmative relief by way of rescission and recovery of property is sought in a court of equity. A corporation cannot maintain a suit in equity to rescind or cancel an *ultra vires* contract, as a lease, for example, and recover what it has parted with, so long as it retains money or

265; Wenlock v. River Dee Co., 19 Q. B. Div. 155, 1 Smith's Cas. 577, 1 Cum. Cas. 277; In re National Permanent Ben. Bldg. Soc., 5 Ch. App. 309, 1 Smith's Cas. 582, 1 Keener's Cas. 807, 1 Cum. Cas. 274; Blackburn Building Soc. v. Cunliffe, 22 Ch Div. 61.

[111] Central Trust Co. v. Ohio Cent. R. Co., 23 Fed. 306.

[112] Manchester & Lawrence R. Co. v. Concord R. Co., 66 N. H. 100.

[113] Boyd v. American Carbon Black Co., 182 Pa. St. 206, 1 Keener's Cas. 777.

[114] Moore v. Swanton Tanning Co., 60 Vt. 459.

property which it has received under the contract. "Many cases hold," said Judge McCrary, "that a corporation which has made a contract *ultra vires,* which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contracts; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other."[115] The same principle applies where a corporation borrows money without authority and secures the payment thereof by delivery of securities. Neither the corporation nor its receiver can repudiate the transaction and recover the securities in equity without repayment of the money received by it.[116]

§ 216. Contracts apparently authorized—Ignorance of want of power.

When want of power on the part of a corporation to enter into a particular contract is apparent, as a matter of law, upon a mere comparison of the contract with the charter of the corporation, the person dealing with the corporation is conclusively presumed to know that the contract is *ultra vires,* for every person must be presumed to know the law. And in such a case, therefore, the corporation cannot be held liable on the contract merely because the other party acted in good faith, and did not in fact know that the contract was unauthorized. "When pow-

[115] American Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 188, 1 Fed. 745, 1 Cum. Cas. 284, 1 Smith's Cas. 469. See, also, Wilson's Case, L. R. 12 Eq. 521; United Lines Tel. Co. v. Boston Safe Deposit & Trust Co., 147 U. S. 431; Memphis & L. R. Co. v. Dow, 19 Fed. 388; Manville v. Belden Min. Co., 17 Fed. 425; New Castle Northern R. Co. v. Simpson, 23 Fed. 214; Buford v. Keokuk Northern Line Packet Co., 69 Mo. 611; Brown v. City of Atchison, 39 Kan. 37.

[116] Wilson's Case, L. R. 12 Eq. 521.

ers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers."[117] This principle can have no application, however, when the contract is apparently within the powers of the corporation, and the other party is ignorant of the facts rendering it *ultra vires*. In other words, "when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply."[118]

Illustrations.—This principle applies, for example, when a corporation executes a note or accepts a bill, or indorses a bill or note, for the mere accommodation of another, and the party who takes the note or acceptance is ignorant of the fact that it is merely accommodation paper.[119] It also applies where a

[117] Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322, 1 Smith's Cas. 451, 1 Cum. Cas. 315. And see East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Keener's Cas. 450, 1 Cum. Cas. 142; Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441, 1 Keener's Cas. 454, 1 Cum. Cas. 146; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Smith's Cas. 564, 1 Keener's Cas. 457, 1 Cum. Cas. 173.

As we have seen, however, in a number of states, the corporation may be estopped to plead that the contract is ultra vires, if the other party has performed the same on his part. See ante, § 215(b).

[118] Per Hoar, J., in Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322, 1 Smith's Cas. 451, 1 Cum. Cas. 315. And see Lucas v. White Line Transfer Co., 70 Iowa, 541, 59 Am. Rep. 449, 1 Keener's Cas. 460; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Humphrey v. Patrons' Mercantile Ass'n, 50 Iowa, 607.

It was said by Judge Selden in a New York case: "Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of ultra vires is available against him. But such a defense will not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed." Bissell v. Michigan Southern & Northern Indiana R. Cos., 22 N. Y. 258, 1 Smith's Cas. 522, 1 Cum. Cas. 187.

As to the liability of a corporation on negotiable instruments, see post, § 217.

[119] Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep.

corporation purchases property which is has apparent authority to purchase, or borrows money which it has apparent authority to borrow, but, without the knowledge of the other party, does so for an unauthorized purpose, or exceeds the limit of indebtedness fixed by its charter or by statute.[120]

§ 217. Negotiable instruments.

In England, as we have seen, it is held that a corporation other than a trading company has no implied power to make, accept, or indorse a negotiable bill or note, and, if it does so, the instrument is void, and no action can be maintained thereon against it. In this country, however, any corporation, unless restricted by its charter or some other statute, has the implied power to become a party to negotiable instruments, provided it does so for a legitimate corporate purpose.[121] It cannot do so, however, for an unauthorized purpose. What, then, is the liability of a corporation on a negotiable instrument where its becoming a party thereto was *ultra vires?* As between the original parties, and as between the corporation and a purchaser of the instrument with notice of the *ultra vires* character of the transaction, or a purchaser after maturity, or a holder who is not a purchaser for value, the contract is governed by precisely the same rule as applies to any other contract.[122] It is different, however, when the instrument has passed into the hands of a *bona fide* purchaser for value and before maturity. In the absence of express statutory provision to the contrary, a corporation cannot avoid liability on a negotiable bill, note, or bond in the hands of a *bona fide* purchaser by setting up the defense

222, 1 Smith's Cas. 451, 1 Cum. Cas. 315; Farmers' & Mechanics' Bank v. Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275; Credit Co. v. Howe Machine Co., 54 Conn. 357, 1 Am. St. Rep. 123; Lyon, Potter & Co. v. First Nat. Bank of Sioux City (C. C. A.) 85 Fed. 120.

[120] Lucas v. White Line Transfer Co., 70 Iowa, 541, 59 Am. Rep. 449, 1 Keener's Cas. 460; Humphrey v. Patrons' Mercantile Ass'n, 50 Iowa, 607. See, also, Ossipee Hosiery & Woolen Mfg. Co. v. Canney, 54 N. H. 295; Connecticut River Sav. Bank v. Fiske, 60 N. H. 363; Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285; Eastern Counties Ry. Co. v. Hawkes, 5 H. L. Cas. 331; Colorado Springs Co. v. American Publishing Co. (C. C. A.) 97 Fed. 843.

[121] Ante, § 181.

[122] National Park Bank of New

that it is *ultra vires* because it was issued in violation of a provision limiting the amount of indebtedness which the corporation might incur,[123] or because it was issued for a purpose for which the corporation was not authorized by its charter to issue it.[124] This rule is within the principle that a corporation is estopped, as against a party without notice, to deny the validity of a contract which is apparently within its powers, but which is *ultra vires* by reason of extraneous facts.[125]

§ 218. Accommodation paper.

A corporation, as we have seen, has no power to issue or indorse a negotiable instrument for the mere accommodation of another;[126] but it cannot set up its want of power as against a *bona fide* purchaser for value before maturity.[127] It may do so, however, as against a purchaser with notice of the *ultra vires* character of the instrument.[128] The fact that the maker of a note procures it to be discounted for his own benefit, if un-

York v. German-American Mutual Warehousing & Security Co., 116 N. Y. 281, 1 Keener's Cas. 513, 1 Cum. Cas. 318; Balfour v. Ernest, 5 C. B. (N. S.) 601.

[123] Wood v. Corry Water Works Co., 44 Fed. 146; Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285.

[124] Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322, 1 Smith's Cas. 451, 1 Cum. Cas. 315; Wright v. Pipe Line Co., 101 Pa. St. 204, 1 Keener's Cas. 508; National Bank of Republic v. Young, 41 N. J. Eq. 531; Mechanics' Banking Ass'n v. New York & Sangerties White Lead Co., 35 N. Y. 505; Louisville, New Albany & C. R. Co. v. Louisville Trust Co., 174 U. S. 552; Credit Co. v. Howe Machine Co., 54 Conn. 357, 1 Am. St. Rep. 123; Lyon, Potter & Co. v. First Nat. Bank of Sioux City (C. C. A.) 85 Fed. 120.

[125] Ante, § 216.

"The general doctrine of the law is that where a corporation has power under any circumstances to issue negotiable paper, a bona fide holder has a right to presume that it was issued under the circumstances which give the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." National Bank of Republic v. Young, 41 N. J. Eq. 531.

[126] Ante, § 182.

[127] Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322, 1 Smith's Cas. 451, 1 Cum. Cas. 315; National Park Bank of New York v. German American Mutual Warehousing & Security Co., 116 N. Y. 281, 1 Keener's Cas. 513, 1 Cum. Cas. 318; Jacobs Pharmacy Co. v. Southern Banking & Trust Co., 97 Ga. 573. Compare Ex parte Estabrook, 2 Low, 547, Fed. Cas. No. 4,534.

[128] National Park Bank of New York v. German American Mutual Warehousing & Security Co., 116 N. Y. 281, 1 Keener's Cas. 513, 1 Cum. Cas. 318.

explained, is notice to the discounter that a corporation's indorsement thereon is not in the usual course of business, but is for the accommodation of the maker.[129]

§ 219. Contracts ultra vires in part only.

If a contract by a corporation is *ultra vires* in part only, the part which is *intra vires* is valid and may be enforced, provided it may be separated from the part which is *ultra vires*. For example, securities taken by a corporation, though *ultra vires* as to some of the debts secured, may be enforced as to those debts for which the corporation was authorized to take them.[130] And where a corporation issues bonds and executes a mortgage to secure the same, the bonds are valid, if within the powers of the corporation, though the mortgage may be *ultra vires*.[131] The rule also applies where a corporation executes a mortgage covering property which it has no power to mortgage, as well as property which it may mortgage. The mortgage is valid as to the latter.[132]

§ 220. Contracts for undisclosed principal.

When a corporation acts as agent of an undisclosed principal, so as to be itself liable as a principal, it is entitled, when such liability is sought to be enforced, to all the rights and privileges which the law would give it if it occupied the position of principal in fact as well as in law. And therefore, when a corporation is sued upon a contract entered into by it as agent for an undisclosed principal, its plea that the contract was *ultra vires*

[129] National Park Bank of New York v. German American Mutual Warehousing & Security Co., 116 N. Y. 281, 1 Keener's Cas. 513, 1 Cum. Cas. 318.

[130] Kansas Valley Nat. Bank v. Rowell, 2 Dill. 371, Fed. Cas. No. 7,611. In this case it was held that a real-estate mortgage to a national bank, to secure a debt previously contracted, might be enforced to this extent, although it also secured future advances, for which, under the national bank act, it could not take a mortgage on real estate.

[131] Illinois Trust & Sav. Bank v. Pacific Ry. Co., 117 Cal. 332; Philadelphia & Sunbury R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

[132] Hendee v. Pinkerton, 14 Allen (Mass.) 381, 1 Keener's Cas. 653, 1 Cum. Cas. 336; Gloninger v. Pittsburgh & Connellsville R. Co., 139 Pa. St. 13.

cannot be avoided on the ground that the contract is one which the undisclosed principal could have made.[133]

§ 221. Failure to comply with requirements of charter as to mode of contracting.

(a) Executory contracts.—If the charter of a corporation or any other statute which is applicable to it requires that it shall enter into contracts in any particular form or manner, and the provision is mandatory and not merely directory, no action will lie on the contract so long as it is wholly executory on both sides.[134] It has also been held that the fact that the contract has been partly performed will not render the corporation liable in an action to recover damages for its failure to perform the residue.[135]

(b) Directory provisions.—As we have seen, provisions of this kind in the charter of a corporation may be merely directory to the officers of the corporation, without affecting or limiting the powers of the corporation, and in such a case contracts made by a corporation without compliance with the provisions will be binding upon it, even though wholly executory.[136]

(c) Ignorance of noncompliance with charter.—If the requirement in the charter of a corporation as to the form or manner of contracting is such that a party contracting with it may not know whether or not it has been complied with by the of-

[133] Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 19 Am. St. Rep. 482, 1 Smith's Cas. 500, 1 Keener's Cas. 819.

[134] Homersham v. Wolverhampton Waterworks Co., 6 Exch. 137; Head v. Providence Ins. Co., 2 Cranch (U. S.) 127; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121; Couch v. City Fire Ins. Co., 38 Conn. 181, 9 Am. Rep. 375; Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 1 Smith's Cas. 218; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612; Lindauer v. Delaware Mutual Safety Ins. Co., 13 Ark. 461; Curtis v. Piedmont Lumber & Min. Co., 109 N. C. 403; Clowe v. Imperial Pine Product Co., 114 N. C. 304; Foulke v. San Diego & Gila Southern Pac. R. Co., 51 Cal. 365; Manderson v. Commercial Bank, 28 Pa. St. 379. See ante, § 192(g).

[135] Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 1 Smith's Cas. 218.

[136] Prince of Wales Life & Educational Assur. Co. v. Harding, El., Bl. & El. 183; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Barnes v. Ontario Bank, 19 N. Y. 152; Dana v. St. Paul Bank, 4 Minn. 385; ante, § 192(g)(5).

ficers of the corporation, he may assume that they have complied with it, and if he enters into the contract in good faith, and in ignorance of the fact that they have failed to comply therewith, the corporation will be estopped to set up such noncompliance to defeat an action on the contract.[137]

(d) Contracts executed on one side.—It has been held where a corporation has fully performed its part of a contract, and the other party has thereby become indebted to it, he cannot defeat an action by the corporation by setting up that the contract was not entered into in the form or manner prescribed by its charter, as that it was not entered into by the number of directors required by its charter.[138] It has also been held in a number of cases that where a corporation has entered into a contract without complying with the requirements of its charter as to the form or mode of contracting, and the contract has been executed by the other party, so that the corporation has received the consideration for its promise, the other party may maintain an action on the contract itself, as the corporation, after it has thus received the benefit of the contract, will be estopped to set up its failure to comply with the requirements of its charter to defeat an action thereon.[139]

This rule does not apply, however, where the charter or statute expressly declares that contracts not made in the form or manner prescribed thereby shall be void, or where the language

[137] Medbury v. New York & Erie R. Co., 26 Barb. (N. Y.) 564; In re Athenaeum Life Assurance Soc., 4 Kay & J. 549; Berks & Dauphin Turnpike Road v. Meyers, 6 Serg. & R. (Pa.) 12; Connecticut Mutual Life Ins. Co. v. Cleveland, Columbus & C. R. Co., 41 Barb. (N. Y.) 9; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548. And see Louisville, New Albany & C. R. Co. v. Louisville Trust Co., 174 U. S. 552.

[138] Smith v. State Bank, 18 Ind. 327; Bradley v. State Bank, 20 Ind. 528; Planters' Bank v. Sharp, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470.

[139] Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121; Zabriskie v. Cleveland, Columbus & C. R. Co., 23 How. (U. S.) 381; Witte v. Derby Fishing Co., 2 Conn. 260; Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; Carrugi v. Atlantic Fire Ins. Co., 40 Ga. 135; New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166; Fister v. La Rue, 15 Barb. (N. Y.) 323; Curtis v. Piedmont Lumber & Min. Co., 109 N. C. 403; Clowe v. Imperial Pine Product Co., 114 N. C. 304; ante, § 192(g)(7).

and the purpose of the provision otherwise show that such was the intention of the legislature.[140]

(e) Action on implied contract.—As we have seen in another place, requirements in the charter of a corporation that it must contract in a certain form only, or that contracts shall be made or signed by certain officers or by a certain number of officers, etc., do not apply to implied or *quasi* contracts. If a corporation, therefore, enters into a contract without compliance with such provisions in its charter, and under the contract receives money or property, or the benefit of services, the other party, even if he cannot maintain an action on the contract itself, may maintain an action *quasi ex contractu,* or on an implied contract, to recover money due him, or the value of the property delivered or services rendered.[141]

V. Effect of Illegal Contracts.

§ 222. In general.—As a rule, if a contract with a corporation, instead of being merely ultra vires, is illegal, either because it is immoral or contrary to public policy, or because it is expressly or impliedly prohibited by statute or by the charter of the corporation, it is void, and no action can be maintained upon it. But this rule does not apply in the case of contracts prohibited by the legislature, where it appears that the legislature did not intend the prohibition to have such an effect.

As a rule, an action will not lie to recover money or property paid or delivered under an illegal contract. But this rule does not necessarily apply to a contract which is merely malum prohibitum. It does not apply to such a contract where the plaintiff and the defendant are not in pari delicto, nor where the action is brought in disaffirmance of the contract before it is executed.

In the preceding sections we have been considering the effect of contracts with a corporation which are merely *ultra vires,*

[140] Head v. Providence Ins. Co., 2 Cranch (U. S.) 127; Couch v. City Fire Ins. Co., 38 Conn. 181, 9 Am. Rep. 375; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612; Manderson v. Commercial Bank, 28 Pa. St. 379.

[141] Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623, 1 Cum. Cas. 121; Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 1 Smith's Cas. 218; Northern Bank of Kentucky v. Johnson, 5 Cold. (Tenn.) 88; ante, § 192 (g) (6).

and not otherwise illegal; that is, contracts which are merely beyond the powers conferred upon the corporation by its charter, and which would be perfectly lawful if entered into between natural persons. We come now to deal with contracts which are not only *ultra vires,* but illegal in the sense in which contracts between natural persons are said to be illegal. As we have seen in another chapter, any contract which would be illegal if entered into between natural persons is illegal when entered into between corporations, or between a corporation and a natural person, unless the charter of the corporation renders the law inapplicable to it.[142] As a general rule, an illegal contract between natural persons is void, and no action can be maintained upon it. *Ex dolo malo non oritur actio.* The same is true of an illegal contract between corporations, or between a corporation and a natural person.[143]

§ 223. Contracts mala in se.

A contract by a corporation to do an immoral thing, or for any immoral purpose, or, as it is otherwise expressed, a contract which is *malum in se,* is absolutely void, and can give no right of action. This rule, however, is not peculiar to contracts by corporations. "It has its root in the universal principle that persons shall not stipulate for iniquity."[144]

§ 224. Contracts contrary to public policy.

If a contract is not merely *ultra vires,* but also illegal because it is contrary to public policy, as in the case of contracts in unreasonable restraint of trade, or to procure a monopoly, etc., it is void, and no action can be maintained upon it. The rule is the same as in the case of contracts between natural persons.[145]

[142] Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 1 Keener's Cas. 799; Providence Tool Co. v. Norris, 2 Wall. (U. S.) 45; and cases hereafter cited.

[143] Providence Tool Co. v. Norris, 2 Wall. (U. S.) 45; White v. Franklin Bank, 22 Pick. (Mass.) 181, 1 Keener's Cas. 749, 1 Cum. Cas. 239; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531, 1 Keener's Cas. 811; and cases hereafter cited.

[144] Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 1 Keener's Cas. 799.

[145] Providence Tool Co. v. Norris, 2 Wall. (U. S.) 45; Marshall v. Baltimore & Ohio R. Co., 16 How.

A railroad company or other *quasi* public corporation cannot maintain an action on the covenants in a lease of its property, by which it rendered itself unable to perform its duties to the public, for the lease is not merely *ultra vires,* but contrary to public policy and illegal.[146]

§ 225. Contracts in violation of charter or statutory prohibition.

(a) In general.—It is a general rule that a contract which is in violation of a statutory prohibition is illegal and void, and that no action can be based upon it, unless it appears that the legislature did not intend that the prohibition should have this effect. And this is true of a contract by a corporation which is expressly or impliedly prohibited by its charter or by any other statute. Such a contract is not only *ultra vires,* but is is illegal, and no action can be maintained upon it, unless it appears from the other provisions of the charter or statute, and the purpose of the prohibition, that the legislature did not intend to make the contract void.[147] It can make no difference

(U. S.) 314; Bliss v. Matteson, 52 Barb. (N. Y.) 335; State v. Hartford & New Haven R. Co., 29 Conn. 538; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302; Emery v. Ohio Candle Co., 47 Ohio St. 320, 21 Am. St. Rep. 819; McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203; Visalia Gas & Electric Light Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105; Garrett v. Kansas City Coal Mining Co., 113 Mo. 330, 35 Am. St. Rep. 713.

[146] Thomas v. West Jersey R. Co., 101 U. S. 71, 1 Smith's Cas. 465, 1 Cum. Cas. 164; Visalia Gas & Electric Light Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105. And see ante, § 162.

[147] White v. Franklin Bank, 22 Pick. (Mass.) 181, 1 Keener's Cas. 749, 1 Cum. Cas. 239; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531, 1 Keener's Cas. 811; Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 1 Keener's Cas. 799; Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. (N. Y.) 31; New York State Loan & Trust Co. v. Helmer, 77 N. Y. 64; In re Jaycox, 12 Blatchf. 209, Fed. Cas. No. 7,237; Talmage v. Pell, 7 N. Y. 328; Cincinnati Mutual Health Assurance Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302; Southern Loan Co. v. Morris, 2 Pa. St. 175, 44 Am. Dec. 188; In re Assignment Mutual Guaranty Fire Ins. Co., 107 Iowa, 143, 70 Am. St. Rep. 149; Garrett v. Kansas City Coal Mining Co., 113 Mo. 330, 35 Am. St. Rep. 713.

In Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302, this principle was applied where a manufacturing company had issued a warehouse receipt, not only ultra vires, but also contrary to the statute law of the state.

Where a mutual insurance company issued a policy which it was

that the contract, but for such prohibition, would be lawful, for "no one is permitted to justify an act which the legislature within its constitutional power has declared shall not be performed."[148]

—**Illustrations.**—Thus, where a statute in Massachusetts expressly provided that no bank should "make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day, with interest," and a bank, in violation of the statute, received a deposit and issued a written promise to pay the same in six months after date, it was held that the promise was illegal and void because of the statute, and that it would not support an action.[149] A like construction has been placed upon statutes prohibiting corporations, not expressly authorized by their charters, from engaging in the business of banking, and notes discounted by a corporation in violation of the prohibition have been held void.[150]

(b) Prohibition merely declaratory of common-law doctrine of ultra vires.—A provision in a general corporation law that no corporation created thereunder shall employ its assets for any other purpose than to accomplish the legitimate objects of its creation is merely declaratory of the common-law rule by which corporations are confined in their powers to the purposes for which they are created, and does not amount to such an ex-

expressly prohibited by law from issuing, it was held that the policy was illegal, and void on that ground, and not merely ultra vires, and that the holder, although he had paid the premiums, could not maintain an action thereon. In re Assignment Mutual Guaranty Fire Ins. Co., 107 Iowa, 143, 70 Am. St. Rep. 149.

A contract under which it is agreed that a corporation shall issue stock as fully paid up, when in fact the payment is intentionally fictitious, contrary to an express constitutional or statutory provision, or to the general policy of the law, is illegal, as well as ultra vires, and is not enforceable. Garrett v. Kansas City Coal Mining Co., 113 Mo. 330, 35 Am. St. Rep. 713.

[148] See Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 1 Keener's Cas. 799.

[149] White v. Franklin Bank, 22 Pick. (Mass.) 181, 1 Keener's Cas. 749, 1 Cum. Cas. 239. And see Southern Loan Co. v. Morris, 2 Pa. St. 175, 44 Am. Dec. 188.

[150] In re Jaycox, 12 Blatchf. 209, Fed. Cas. No. 7,237; Philadelphia Loan Co. v. Towner, 13 Conn. 249; New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100. Compare, however, post, § 225(g).

press statutory prohibition of *ultra vires* loans and other transactions as to render them illegal instead of *ultra vires* merely.[151]

(c) Intention of legislature not to render contract void.—As is stated above, the fact that the legislature has prohibited a corporation from entering into certain contracts does not render a contract in violation of the prohibition void, if it appears that the legislature did not intend the prohibition to have this effect, but contemplated some other penalty, for "in declaring the effect of statutes prohibitory in form, courts have but one object in view,—the real purpose of the statute; the real intention of the legislature in its enactment."[152] This view is clearly settled, but in the construction of particular statutes the courts have differed. Take, for example, the statutes in the different states which require foreign corporations to comply with certain conditions before doing business in the state, but which do not in express terms declare the effect of violating the prohibition. Some courts have held that the prohibition renders contracts by foreign corporations before complying with the conditions precedent to doing business absolutely void, so that no action can be maintained thereon, while others have thought that the legislature did not intend the prohibition to have this effect, and have held such contracts to be valid.[153]

(d) Lending money, discounting, and taking securities.—There is also a direct conflict in the decision as to the effect of a charter or statutory prohibition against discounting or lending money on certain securities. If the statute expressly declares that securities taken in violation of the prohibition shall be void, such securities cannot be enforced.[154] Some courts have gone further, and have held that the mere fact of prohibition renders them void and unenforceable;[155] but this construction

[151] Bond v. Terrell Cotton & Woolen Mfg. Co., 82 Tex. 309, 1 Smith's Cas. 507; Farmers' Nat. Bank of Valparaiso v. Sutton Mfg. Co., 52 Fed. 191; Butterworth & Lowe v. Kritzer Milling Co., 115 Mich. 1.

[152] Washburn Mill Co. v. Bartlett, 3 N. D. 138, 1 Smith's Cas. 515; Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95.

[153] Washburn Mill Co. v. Bartlett, 3 N. D. 138, 1 Smith's Cas. 515. See post, chapter XXVI.

[154] Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531, 1 Keener's Cas. 811.

[155] New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; North

is not supported by the weight of authority. The better opinion is that where the charter of a corporation or some other statute prohibits it from lending money on certain kinds of security, but does not declare that prohibited securities taken by it shall be void, they are not void, and may be enforced by it. The taking of such security is a misuser of the powers conferred upon the corporation by its charter, for which the state may enforce a forfeiture, but the misuser cannot be set up by the borrower to prevent the corporation from enforcing the security.[156] It has been so held, for example, but under the national bank act, which impliedly prohibits such associations from lending money on real-estate security, but does not declare such security void. Mr. Justice Swayne said in such a case: "We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government."[157]

The same is true of the provision in the national bank act prohibiting a national bank from lending a person a greater amount than ten per cent. of its capital stock. A borrower cannot set up violation of the statute to defeat an action by the bank to recover the money loaned or to defeat securities given therefor.[158] A like construction has been placed upon a state stat-

River Ins. Co. v. Lawrence, 3 Wend. (N. Y.) 482; Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. (N. Y.) 31.

[156] Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95; National Bank of Genesee v. Whitney, 103 U. S. 99, 1 Keener's Cas. 567, 1 Cum. Cas. 102; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Mott v. United States Trust Co., 19 Barb. (N. Y.) 568.

[157] Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 1 Keener's Cas. 562, 1 Cum. Cas. 95.

[158] Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640;

ute prohibiting savings banks from lending their funds on the security of names alone, and it has been held that a savings bank may enforce payment of a promissory note taken for money loaned in violation of the statute.[159]

(e) Loans to officers.—A statute prohibiting a corporation from making loans to its officers does not render void the promise of an officer who has borrowed from the corporation in violation of the statute. Such a statute, said the Massachusetts court, "is designed to forbid officers, who are charged with the duty of investing the funds of the corporation, borrowing of themselves, and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policy holders from the dishonesty or self-interest of the officers. It is intended as a shield to the corporation. To construe it as making the promises of the officers who borrow money in violation of its provisions void would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the officers, not upon themselves, but upon the corporation for whose protection the statute was made. It would require a plain expression of legislative intention to lead us to such a construction.[160]

(f) Limitation of indebtedness.—Some of the courts hold that a provision in the charter of a corporation, or in a general law, limiting the amount of indebtedness which the corporation may incur, provided it is not merely directory,[161] prohibits and renders absolutely void a contract by the corporation which increases its indebtedness beyond the limit, and that no action can be maintained thereon by the other party, unless he en-

Shoemaker v. National Mechanics' Bank, 2 Abb. 416, Fed. Cas. No. 12,-801; Wyman v. Citizens' Nat. Bank of Faribault, 29 Fed. 734; O'Hara v. Second Nat. Bank of Titusville, 77 Pa. St. 96; Vining v. Bricker, 14 Ohio St. 331; Mills County Nat. Bank v. Perry, 72 Iowa, 15, 2 Am. St. Rep. 228.

[159] Farmington Sav. Bank v. Fall, 71 Me. 49.

And so it was held of a statute prohibiting a bank from discounting paper without at least two names on it. Roberts v. Lane, 64 Me. 108, 18 Am. Rep. 242.

[160] Bowditch v. New England Mutual Life Ins. Co., 141 Mass. 292, 55 Am. Rep. 474. And see Lester v. Howard Bank, 33 Md. 558, 3 Am. Rep. 211.

[161] Ante, § 179.

tered into the contract in good faith and without knowledge of the facts rendering it *ultra vires*.[162] Other courts have taken a different view, and have held that the corporation, after receiving the benefit of the contract, cannot set up its violation of the prohibition to defeat an action thereon.[163]

(g) Penalty pointed out by the statute.—A prohibitory statute may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the legislature intended to define such consequences, and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced. In such a case, if an action can be maintained on the transaction of which the prohibited act was a part, without sanctioning the illegality of the transaction, such an action will be entertained. This principle was applied in a New York case where a corporation had loaned money by discounting commercial paper in violation of a statute prohibiting loans on such securities, and declaring that such securities, if taken, should be void. It was held that securities for a loan taken in violation of the statute were void,

[162] In re Pooley Hall Colliery Co., 21 Law T. (N. S.) 690; Chambers v. Manchester & Milford Ry. Co., 5 Best & S. 588; Covington First Nat. Bank v. D. Kiefer Milling Co., 95 Ky. 97; Kraniger v. People's Building Soc., 60 Minn. 94.

In Kentucky it is held that a debt created by a corporation in excess of the limit prescribed by its articles is void for the excess as against subsequent creditors without notice; and that, while all persons who deal with a corporation are chargeable with notice of the limit of indebtedness prescribed by its articles, the record of a mortgage executed by a corporation to secure a debt in excess of the limit is not constructive notice to subsequent creditors that the limit has been exceeded. Bell & Coggeshall Co. v. Kentucky Glass Works Co. (Ky.) 50 S. W. 2, modifying 48 S. W. 440.

[163] Weber v. Spokane Nat. Bank, 29 U. S. App. 97, 64 Fed. 208, reversing 50 Fed. 735; Allis v. Jones, 45 Fed. 148; Poole v. West Point Butter & Cheese Ass'n Co., 30 Fed. 513; Humphrey v. Patrons' Mercantile Ass'n, 50 Iowa, 607; Garrett v. Burlington Plow Co., 70 Iowa, 697, 59 Am. Rep. 461; Sherman Center Town Co. v. Morris, 43 Kan. 282, 19 Am. St. Rep. 134; Sherman Center Town Co. v. Russell, 46 Kan. 382; Ossipee Hosiery & Woolen Mfg. Co. v. Canney, 54 N. H. 295; Connecticut River Sav. Bank v. Fiske, 60 N. H. 363. See, also, Atwood v. Shenandoah Valley R. Co., 85 Va. 966; Warfield, Howell & Co. v. Marshall County Canning Co., 72 Iowa, 666, 2 Am. St. Rep. 263; Beach v. Wakefield, 107 Iowa, 567; Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America (C. C. A.) 82 Fed. 124.

but that an action could be maintained by the corporation to recover the money loaned.[164]

§ 226. Relief of party from illegal contract.

(a) In general.—Assuming that a contract by a corporation is illegal, so that no action will lie to enforce the same, the question arises whether a court will grant either or both of the parties relief from the consequences of such a contract. As a general rule, subject to the exceptions hereafter stated and explained, when an illegal contract has been executed by one or both of the parties, in whole or in part, by the payment of money or transfer of property, no action will lie to recover the money or property. The maxim is, *ex dolo malo non oritur actio.*

"No court," said Lord Mansfield, "will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law, * * * the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because it will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*"[165] And it was said by Lord Kenyon: "There is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *particips criminis,* an action has been maintained to recover it back."[166]

[164] Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531, 1 Keener's Cas. 811. See, also, Harris v. Runnels, 12 How. (U. S.) 80; Faneuil Hall Bank v. Bank of Brighton, 16 Gray (Mass.) 534; Ossippee Hosiery & Woolen Mfg. Co. v. Canney, 54 N. H. 295; Connecticut River Sav. Bank v. Fiske, 60 N. H. 363.

[165] Holman v. Johnson, 1 Cowp. 341.

[166] Howson v. Hancock, 8 Term R. 575.

This principle, except as hereafter stated, applies to *illegal* contracts of corporations.

(b) Contracts mala in se.—When a contract is contrary to public morals, or founded upon an immoral consideration, it is *malum in se,* and in such a case the law will not undertake to relieve the parties from the position in which they have placed themselves, or to adjust the equities between them.[167] This, of course, is as applicable to contracts of a corporation as it is to contracts between natural persons.

(c) Contracts merely mala prohibita.—The same consequence, however, does not necessarily follow from a contract by a corporation which is merely *malum prohibitum.* In such a case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and, if equity and justice require a restoration of money or property received by either party thereunder, it will in many cases grant relief. If a contract by a corporation is merely forbidden by statute, and is not immoral or otherwise illegal aside from the prohibition, and the corporation has received under it money which in equity it ought to repay, or property or services for which in equity it ought to pay, the law will imply a promise to pay, and an action *quasi ex contractu* may be maintained.[168]

Where a bank or other corporation lends money on securities prohibited by its charter or by statute, the fact that taking such securities is illegal, and the securities void and unenforceable, does not prevent it from maintaining an action to recover the money loaned.[169] And where a bank receives a deposit of money, and issues a written contract to repay it in a form forbidden by a statute, it is liable in an action on implied contract for the money received by it.[170]

[167] See treatises on the law of contracts.

[168] See White v. Franklin Bank, 22 Pick. (Mass.) 181, 1 Keener's Cas. 749, 1 Cum. Cas. 239.

[169] Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531, 1 Keener's Cas. 811.

[170] White v. Franklin Bank, 22 Pick. (Mass.) 181, 1 Keener's Cas. 749, 1 Cum. Cas. 239.

(d) Contracts fully executed.—If an illegal contract with a corporation has been fully executed on both sides, neither party can maintain an action to rescind and to recover what he has parted with. As the parties are equally guilty of violating the law, the court will leave them where they have placed themselves.[171]

Under the national bank act, which prohibits national banks from making loans on the security of shares of their own stock, it has been held that the courts will not interfere at the suit of a borrower from a bank, who has pledged shares of stock in a bank as collateral, after the bank has sold the shares, and applied the proceeds to payment of the loan.[172]

(e) Parties not in pari delicto.—The rule that no action will lie to recover money paid under an illegal contract does not apply where the party seeking relief is not *in pari delicto* with the other, and the parties are not regarded as being *in pari delicto* where the contract is merely *malum prohibitum,* and the prohibition was intended for the protection of the party asking relief. In such a case relief may be granted. This principle has been applied under statutes prohibiting banks or other corporations from issuing certain securities, but imposing no penalty upon persons receiving them, and it has been held that, as the prohibition is intended for the protection of the public against such securities, persons who purchase or lend money upon such securities are not *in pari delicto* with the corporation issuing them, and that they may therefore recover the money paid or loaned.[173]

(f) Locus poenitentiae.—It is also a general principle that, so long as an illegal contract which is merely *malum prohibitum* is still executory, there is a *locus poenitentiae,* and that, while this is the case, it may be rescinded or disaffirmed, and money

[171] First Nat. Bank of Xenia v. Stewart, 107 U. S. 676, 1 Cum. Cas. 397.

[172] First Nat. Bank of Xenia v. Stewart, 107 U. S. 676, 1 Cum. Cas. 397.

[173] White v. Franklin Bank, 22 Pick. (Mass.) 181, 1 Keener's Cas. 749, 1 Cum. Cas. 239; Oneida Bank v. Ontario Bank, 21 N. Y. 490; Thomas v. City of Richmond, 12 Wall. (U. S.) 349.

paid under it recovered back. This principle was applied in a Massachusetts case where a person who had deposited money in a bank, and received from the bank a written contract to repay which the bank was prohibited by statute from issuing, disaffirmed the contract, and brought an action to recover the money.[174] And it was applied in a Wisconsin case where a corporation which had paid money under an *ultra vires* contract to purchase goods sued to recover the money before the contract was carried out.[175]

The New York court has repudiated the doctrine in relation to the existence of a *locus poenitentiae*.[176]

VI. CONVEYANCES OR TRANSFERS TO OR FROM CORPORATION.

§ 227. In general.—There is some conflict in the decisions as to the effect of an executed conveyance or transfer of real or personal property to a corporation in excess of the powers conferred upon it by its charter. The following propositions, however, are established by the weight of authority:

(1) Unless a corporation is absolutely prohibited and incapacitated to take and hold real or personal property, or a chose in action, as the case may be, an executed conveyance or transfer to it passes the title, and no one but the state can object that the conveyance or transfer was for an unauthorized purpose, or that it was otherwise in excess of the power conferred upon the corporation by its charter.

(2) An ultra vires or prohibited conveyance or transfer of real or personal property by a corporation is not void, but passes the title, and the corporation cannot maintain a suit to set the same aside and recover the property.

(3) An ultra vires or prohibited mortgage by a corporation is not void after the corporation has had the benefit of the con-

[174] White v. Franklin Bank, 22 Pick. (Mass.) 181, 1 Keener's Cas. 749, 1 Cum. Cas. 239.

[175] Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Smith's Cas. 590, 1 Cum. Cas. 245.

[176] Knowlton v. Congress & Empire Spring Co., 57 N. Y. 518. But see Congress & Empire Spring Co. v. Knowlton, 103 U. S. 49.

tract under which it was given, unless it is void as being contrary to public policy.

§ 228. Ultra vires or prohibited conveyance of real property to corporation.

As stated above, there is some conflict in the decisions in the different jurisdictions as to the effect of an *ultra vires* or prohibited conveyance of land to a corporation. By the decided weight of authority, however, if a corporation is authorized in some cases, or for some purposes, or to a certain extent, to take and hold the title to real estate, an *ultra vires* conveyance passes the title, and no one but the state can object that the conveyance was for an unauthorized purpose, or that it was otherwise in excess of the powers conferred upon the corporation by its charter. And it follows that a corporation which has made an *ultra vires* purchase of real estate, and received a conveyance, may not only hold the same, but may also sell it, and convey a good title, and, if it does sell it, may recover the price.[177]

[177] Hough v. Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230, 1 Cum. Cas. 90; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 1 Smith's Cas. 453, 1 Keener's Cas. 551, 1 Cum. Cas. 85; Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 1 Smith's Cas. 457, 1 Keener's Cas. 766; Fayette Land Co. v. Louisville & Nashville R. Co., 93 Va. 274, 1 Smith's Cas. 459; Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544; Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 1 Keener's Cas. 522.

See, also, Runyan v. Coster's Lessee, 14 Pet. (U. S.) 122; Jones v. Habersham, 107 U. S. 174; American Mortgage Co. v. Tennille, 87 Ga. 28; Mapes v. Scott, 94 Ill. 379; Alexander v. Tolleston Club of Chicago, 110 Ill. 65; Barnes v. Suddard, 117 Ill. 237; Hamsher v. Hamsher, 132 Ill. 273; Chicago, Burlington & Q. R. Co. v. Lewis, 53 Iowa, 101; Hanson v. Baltimore Little Sisters of the Poor, 79 Md. 434; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594; Bone v. Delaware & Hudson Canal Co. (Pa. St.) 5 Atl. 751; Chamberlain v. Northeastern R. Co., 41 S. C. 399, 44 Am. St. Rep. 717; Gilbert v. Hole, 2 S. D. 164; Barrow v. Nashville & Charlotte Turnpike Co., 9 Humph. (Tenn.) 304; Bank of Virginia v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; Ayers v. South Australian Banking Co., L. R. 3 P. C. 548, 1 Keener's Cas. 554, 2 Cum. Cas. 20; Rogers v. Nashville, Chattanooga & St. L. Ry. Co. (C. C. A.) 91 Fed. 299; Cowell v. Colorado Springs Co., 100 U. S. 55; Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 1 Keener's Cas. 522; South & North Alabama R. Co. v. Highland Avenue & Belt R. Co., 119 Ala. 105; Cooney v. A. Booth Packing Co., 169 Ill. 370; Chicago & Alton R. Co. v. Keegan, 185 Ill. 70; Henderson v. Virden Coal Co., 78 Ill. App. 437; Brown v. Bradford, 103 Iowa, 378; Walsh

It is a well-established principle, said the Alabama court in a late case, "that when a party sells and conveys property to a corporation, which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the state, the sovereign alone having the right to impeach the transaction; and until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only on office found."[178] And in a late Virginia case it was said by Judge Keith, after a review of the authorities: "No one can be heard to question the right of a corporation to acquire and hold real estate, except the state by which the corporation was created, or that state within whose limits and by whose permission or authority, express or implied, it does business, and it must do so by a direct proceeding instituted for that purpose."[179]

It has been held that when a corporation is absolutely prohibited by its charter or by statute from taking land, it is wholly

v. Barton, 24 Ohio St. 28; Hagerstown Manufacturing, Mining & Land Improvement Co. v. Keedy, 91 Md. 430; Miller v. Flemingsburg & Fox Springs Turnpike Co. (Ky.) 59 S. W. 512. Compare Thweatt v. Bank of Hopkinsville, 81 Ky. 1.

One who contracts to buy land or takes a conveyance from a corporation cannot object that the corporation acted ultra vires in acquiring the land. Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 1 Keener's Cas. 522.

A bank which has acquired land ultra vires, and has sold and conveyed the same, may recover the price, and it may require the vendee to specifically perform an agreement to give a bond and deed of trust to secure the same. Bank of Virginia v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

One who holds possession of land adversely cannot, as against a corporation holding the legal title, set up that the corporation had no power to acquire the land. Chicago & Alton R. Co. v. Keegan, 185 Ill. 70.

A purchase of one railroad company by another, when fully executed by a conveyance, cannot be attacked as ultra vires by a stockholder of a third corporation to which the vendee corporation has leased the same, in an action to set aside the lease. Rogers v. Nashville, Chattanooga & St. L. Ry. Co. (C. C. A.) 91 Fed. 299.

[178] Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 1 Smith's Cas. 457, 1 Keener's Cas. 766.

[179] Fayette Land Co. v. Louisville & Nashville R. Co., 93 Va. 274, 1 Smith's Cas. 459.

"It would lead to infinite incon-

incapacitated to do so, and a conveyance to it in violation of the prohibition is void and passes no title.[180] This rule has been applied when a corporation has exhausted its capacity by having already acquired land to the full limit of its capacity;[181] but its application to such a case, if, indeed, the doctrine can be sustained at all, is not supported by the weight of authority.[182]

Power of the state to confiscate or escheat land.—Although *dictum* may be found in the text-books, and in many of the cases, to the effect that land acquired by a corporation in excess of its powers, or in violation of its charter, is, as in the case of land conveyed to an alien not authorized to take and hold land, subject to escheat or forfeiture by the state, if proper proceedings are instituted to declare a forfeiture, there is no decision in support of any such doctrine. It is no doubt within the power of the legislature to expressly provide for forfeiture to the state of land acquired *ultra vires* by a private corporation, but, in the absence of such a statute, the state cannot confiscate the land of a corporation because it has no power to hold the same. The only remedy of the state is to proceed against the corporation to forfeit its charter, as will be explained in a subsequent chapter.*

§ 229. Ultra vires or prohibited transfer of personal property or choses in action to corporation.

(a) In general.—The same doctrine applies to an *ultra vires*

venience and embarrassments," said Judge Field in a California case, "if in suits by corporations to recover possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544.

[180] St. Peter's Roman Catholic Congregation v. Germain, 104 Ill. 440; Cromie's Heirs v. Louisville Orphans' Home Soc., 3 Bush. (Ky.) 365.

[181] St. Peter's Roman Catholic Congregation v. Germain, 104 Ill. 440; Cromie's Heirs v. Louisville Orphans' Home Soc., 3 Bush. (Ky.) 365.

[182] See the cases cited in note 177, supra.

* Com. v. New York, Lake Erie & W. R. Co., 132 Pa. St. 591. See 8 Harvard Law Rev. 15.

In some states, provision for forfeiture or escheat to the state has been made by statute.

or prohibited transfer of personal property to a corporation. The transfer vests the title in the corporation as against every person except the state, and even as against the state except in a direct proceeding. Its title to the property, or an action of replevin, trover, or trespass, cannot be attacked or defeated on the ground that the purchase of the property was in violation of a prohibition or limitation in its charter or in a general law, or on the ground that it was for a purpose not authorized by its charter.[183]

(b) Choses in action.—This principle applies when a corporation purchases and takes an assignment of a promissory note or other chose in action. It acquires a good title, and its right to maintain an action cannot be questioned on the ground that its taking of the same was for an unauthorized purpose, or was contrary to an express or implied prohibition in its charter.[184]

In a late Wisconsin case a trading corporation engaged in buying and selling dry goods brought an action against certain persons to recover damages for conspiracy to defraud it by purchasing goods on credit with the intention of not paying for them, and also to recover on similar claims in favor of others, which had been purchased by and assigned to it. The court held that its purchase of these other claims was *ultra vires,* but that this fact could not be set up by the defendants to defeat the action thereon. "We hold," said the court, "that if a corporation purchases, pays for, and takes an assignment of a cause

[183] Ayers v. South Australian Banking Co., L. R. 3 P. C. 548, 1 Keener's Cas. 554, 2 Cum. Cas. 20; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 53 Hun (N. Y.) 52, 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85; Parish v. Wheeler, 22 N. Y. 494, 2 Cum. Cas. 58; National Pemberton Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235; Prescott Nat. Bank of Lowell v. Butler, 157 Mass. 548; De Camp v. Dobbins, 29 N. J. Eq. 36; Rutland & Burlington R. Co. v. Proctor, 29 Vt. 93; Edwards v. Fairbanks, 27 La. Ann. 449; John V. Farwell Co. v. Wolf, 96 Wis. 10.

[184] National Pemberton Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235; Prescott Nat. Bank of Lowell v. Butler, 157 Mass. 548; Baker v. Northwestern Guaranty Loan Co., 36 Minn. 185. Contra, Straus v. Eagle Ins. Co., 5 Ohio St. 60; Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198, 23 Am. Rep. 683; First Nat. Bank of Rochester v. Pierson, 24 Minn. 140, 31 Am. Rep. 341. See Merchants' Nat. Bank of St. Paul v. Hanson, 33 Minn. 40, 53 Am. Rep. 5.

of action respecting matters outside of the purposes of its creation and not authorized by its charter, in any action to enforce such cause of action want of corporate power to engage in such business cannot be interposed as a defense."[185]

(c) Stock in another corporation.—The principle also applies where a corporation makes an *ultra vires* purchase of shares of stock in another corporation. It acquires the title to the stock, and as owner is entitled to dividends and is subject to the statutory liability for corporate debts.[186]

§ 230. Suit by corporation to obtain title.

Though the title to land will vest in a corporation under a conveyance to it, notwithstanding its taking the land may not be authorized by its charter, it seems that a court of equity will not aid it in obtaining the title to land when its charter gives it no authority to hold the same.

In a late case in the supreme court of the United States, land was donated to a railroad company by persons interested in the construction of its road, and was conveyed to its officers, who afterwards refused to convey the same to the company. In a suit in equity against them by a receiver of the company to obtain a decree declaring a trust in favor of the company, and compelling them to convey to it, the relief was denied on the ground that the charter of the company did not authorize it to hold the land for the purposes for which it was donated. In delivering the opinion of the court, Mr. Justice Miller said: "We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us in not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is

[185] John V. Farwell Co. v. Wolf, 96 Wis. 10.

[186] Germania Nat. Bank of New Orleans v. Case, 99 U. S. 628, 1 Cum. Cas. 948; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 1 Keener's Cas. 730, 2 Cum. Cas. 85; Milbank v. New York, Lake Erie & W. R. Co., 64 How. Pr. (N. Y.) 20, 1 Smith's Cas. 963, 1 Cum. Cas. 353.

plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to hold such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."[187]

§ 231. Ultra vires conveyances, transfers, or incumbrances by corporations.

(a) In general.—The effect of covenants in an *ultra vires* conveyance or lease, and the right to maintain an action thereon, has been considered in treating of *ultra vires* contracts.[188] In the present connection it is only necessary to consider the effect of *ultra vires* conveyances and leases, viewed simply as transfers of property, apart from any covenants therein, and the effect of *ultra vires* mortgages. It is well settled that an *ultra vires* conveyance or lease of real property by a corporation, or an *ultra vires* transfer of personal property, including notes and other choses in action, like a conveyance or transfer to a corporation in excess of its powers, is not absolutely void, but passes the title.[189] And it has been held by the supreme court

[187] Case v. Kelly, 133 U. S. 21, 1 Smith's Cas. 495, 1 Keener's Cas. 580, 1 Cum. Cas. 106.

[188] Ante, § 211 et seq.

[189] American Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 188, 1 Fed. 745, 1 Cum. Cas. 284, 1 Smith's Cas. 469; St. Louis, Vandalia & T. H. R. Co. v. Terre Haute & Indianapolis R. Co., 145 U. S. 393, 1 Smith's Cas. 472, 1 Keener's Cas. 773, 2 Cum. Cas. 778; Rogers v. Nashville, Chattanooga & St. L. Ry. Co. (C. C. A.) 91 Fed. 299; City of Spokane v. Amsterdamsch Trustees Kantoor (Wash.) 60 Pac. 141.

After a corporation has sold property, and its vendee has mortgaged the same, and the mortgage has been foreclosed, the fact that the sale by the corporation was

of the United States in a late case that where an *ultra vires* contract for the sale or lease of property by a corporation has been executed by the delivery of possession, and the parties are *in pari delicto,* the corporation cannot maintain a suit in equity to cancel the conveyance or lease and recover possession of the property, but the court will leave the parties in the position in which they have placed themselves.[190]

(b) Ultra vires mortgage by corporation.—Some courts seem to have held that an *ultra vires* or prohibited mortgage of its property by a corporation is void, and that its invalidity may be set up, either at law or in equity, and either by the corporation itself or its receiver, or by persons claiming under a later valid conveyance or mortgage.[191] The better opinion, however, is that when a corporation has had the benefit of money borrowed, and for which it has given a mortgage, it cannot defeat a suit to foreclose the mortgage on the ground that borrowing the money and giving the mortgage was *ultra vires.*[192]

In the supreme court of the United States, where a mortgage by a corporation to secure future advances was attacked as *ultra vires,* but such mortgages were not expressly prohibited or declared void, Mr. Justice Swayne said, in substance: "If the mortgage here in question be *ultra vires,* no one can take advantage of the defect of power involved but the state. As to all other parties, it must be held valid, and may be enforced accordingly. * * * Where money has been obtained by a corporation upon its securities which are irregular and *ultra vires,* but the money is applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and shareholders are estopped from denying the liability of the com-

ultra vires cannot affect the title to the property. City of Spokane v. Amsterdamsch Trustees Kantoor (Wash.) 60 Pac. 141.

190 St. Louis, Vandalia & T. H. R. Co. v. Terre Haute & Indianapolis R. Co., 145 U. S. 393, 1 Smith's Cas. 472, 1 Keener's Cas. 773, 2 Cum. Cas. 78.

191 Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Smith's Cas. 190, 1 Keener's Cas. 650, 1 Cum. Cas. 331; Hendee v. Pinkerton, 14 Allen (Mass.) 381, 1 Keener's Cas. 653, 1 Cum. Cas. 336.

192 Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110; Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 1 Keener's Cas. 656, 1 Cum. Cas. 326.

pany to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company."[193]

If a mortgage of its property by a corporation is not only *ultra vires,* but contrary to public policy, it is absolutely void and cannot be enforced. This is true, for example, of a mortgage by a *quasi* public corporation, as a railroad company, for example, of property which is necessary to enable it to perform the duties which it owes the public, and in consideration of which its franchises have been conferred upon it.[194]

(c) Partial invalidity.—According to a well-settled principle, a conveyance, lease, or mortgage by a corporation may be valid in so far as it is within the power of the corporation, and invalid in so far as it is *ultra vires,* if the part which is authorized can be separated from the part which is not. Thus, a conveyance or mortgage by a corporation of its franchises and property is not invalid as to such property as it could convey or mortgage because it is invalid as to the franchises and as to property necessary to enable it to perform its duty to the public.[195] And a mortgage to secure debts lawfully contracted by the corporation is not invalid as to these because it also covers alleged indebtedness under *ultra vires* contracts.[196]

VII. Devise or Bequest to Corporation.

§ 232. In general.—Though there are decisions to the contrary, the better opinion is that a devise or bequest to a corporation is void and of no effect if the corporation has no power under its charter to take the property devised or bequeathed.

There are differences between the effect of a conveyance or

[193] Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 1 Keener's Cas. 656, 1 Cum. Cas. 326.

[194] Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Smith's Cas. 190, 1 Keener's Cas. 650, 1 Cum. Cas. 331; Hendee v. Pinkerton, 14 Allen (Mass.) 381, 1 Keener's Cas. 653, 1 Cum. Cas. 336.

[195] Hendee v. Pinkerton, 14 Allen (Mass.) 381, 1 Keener's Cas. 653, 1 Cum. Cas. 336. And see Butler v. Rahm, 46 Md. 541; Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43; Gloninger v. Pittsburgh & Connellsville R. Co., 139 Pa. St. 13.

[196] Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43, 51.

transfer of property to a corporation, *inter vivos,* and a devise or bequest. A conveyance or transfer *inter vivos* vests the title in the corporation. A bequest, on the other hand, though authorized by the common law, does not *ipso facto* vest the title in the legatee, but requires action or consent by the executor, in whom the title vests, and action by the court, if he refuses to consent.[197] And a devise of real property, though, like a conveyance, it vests the title directly in the devisee, is valid only when authorized by the statute of wills. For these reasons, among others, the principles which govern *ultra vires* conveyances and transfers to corporations do not necessarily apply to devises and bequests.

§ 233. Devise of real property.

It is clear that, if the statute of wills of a state does not allow a devise of land to a corporation, such a devise is necessarily void and of no effect whatever, for it is only by virtue of the statute that land can be devised at all.[198] This question, however, has nothing to do with the powers of corporations. Suppose, however, that the statute of wills does allow devises to corporations, and a devise is made to a corporation whose charter does not give it the power to take the land. Does the devise, as in the case of a conveyance *inter vivos,* vest the title in the corporation as against every person except the state,[199] or is it void because of the corporation's want of power? To this question the courts have given different answers. Some of the courts have held that the devise in such a case vests the title in the corporation, notwithstanding its want of capacity under its charter, and is valid as against every person but the state.[200]

[197] See Trustees of Davidson College v. Chambers Ex'rs, 3 Jones Eq. (N. C.) 253, 1 Smith's Cas. 476.

[198] It is so in New York, for example, where by statute no devise to a corporation is valid unless it is expressly authorized by its charter, or by statute, to take by devise. McCartee v. New York Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Chamberlain v. Chamberlain, 43 N. Y. 424; White v. Howard, 46 N. Y. 144; Starkweather v. American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; ante, § 140.

[199] Ante, § 228.

[200] Jones v. Habersham, 107 U. S. 174; De Camp v. Dobbins, 29 N.

Other courts have held that the principle governing conveyances to corporations does not apply, that the devise is void, and that the title to the land vests in the residuary devisees or heirs.[201]

In a late Maine case,* a will left to a charitable corporation property which, if it should be allowed to take the same, would result in its having more property than was allowed by its charter, which authorized it to take and hold by purchase, gift, devise or bequest, personal or real estate, in all not exceeding one hundred thousand dollars in value, owned at any one time. The next of kin of the testator sued in equity to have the devise and bequest declared inoperative and void. After an exhaustive review of the authorities, the court held that he was not entitled to the relief prayed for, as the devise and bequest were valid as against every person except the state. It was held—to go more into detail, as stated in substance by the court—that the will was valid on its face, there being no statute limiting the testamentary capacity of the testator; that the limitation in the charter of the corporation of the amount of property it might hold was mainly intended as a regulative and directory provision, and was only impliedly prohibitory, no

J. Eq. 36; Hanson v. Baltimore Little Sisters of the Poor, 79 Md. 434; In re Stickney's Will, 85 Md. 79, 60 Am. St. Rep. 308; Farrington v. Putnam, 90 Me. 405, 1 Keener's Cas. 594; Hamsher v. Hamsher, 132 Ill. 273.

In a late Maryland case, where a will devised to a corporation property in excess of what its charter authorized it to hold, the court said: "It cannot be denied that this corporation had power to take any estate and property not exceeding the charter limits, and the devise therefore was not void on its face, and it must be held valid as to all the world until it has been determined, at the instance of the state, that the charter has been violated. If they have violated the law of their being they have committed a wrong not against any particular individual but against the state, and this wrong can only be inquired into at the instance of the state. In other words the corporation can take property to any amount, but can hold it, as against the state, only to the amount provided by its charter." Hanson v. Baltimore Little Sisters of the Poor, 79 Md. 434.

[201] In re McGraw's Estate, 111 N. Y. 66, 1 Smith's Cas. 483, 1 Keener's Cas. 571, 2 Cum. Cas. 22; Brown v. Thompkins, 49 Md. 423; Heiskell v. Chickasaw Lodge, 87 Tenn. 686; House of Mercy of New York v. Davidson, 90 Tex. 529. And see Starkweather v. American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Wood v. Hammond, 16 R. I. 98; Trustees of Davidson College v. Chamber's Ex'rs, 3 Jones, Eq. (N. C.) 253, 1 Smith's Cas. 476.

* Farrington v. Putnam, 90 Me. 405, 1 Keener's Cas. 594.

penalties being attached thereto; that the charter was a contract or compact between the corporation and the state, the limitation being for the benefit of the general public represented by the state, and not for the heirs of the testator or any particular persons; that any transgression of the compact by the corporation in accepting excessive devises and bequests were voidable only, and not void, and must be treated as valid until declared void; that whether they should be declared void, or be permitted to remain as valid, was a question of policy or expediency which the state must determine for itself,—a governmental, and not a judicial, question; that such question could only be determined in a direct proceeding by the state, and not by any collateral proceeding brought by or for the benefit of any individuals to set the provisions of the will aside.

§ 234. Bequest of personal property.

If a statute prohibits a bequest to a corporation, such a bequest is void, and the property goes to the next of kin or the residuary legatee.[202] And by the weight of authority, a bequest to a corporation is also void where the corporation is prohibited by its charter or by a general law from taking the property.[203] A decision to this effect in a North Carolina case was based upon the ground that a bequest does not vest the title to the property bequeathed directly in the legatee, like a gift or conveyance *inter vivos,* but requires, to give him the title, the consent of the executor, and, if he withholds his consent, action by the court, and that a court will not require the executor to pay or deliver money or property to a corporation in pursu-

[202] Cromie's Heirs v. Louisville Orphans' Home Soc., 3 Bush. (Ky.) 365; Cornell University v. Fiske, 136 U. S. 152; State v. Warren, 28 Md. 338; Brown v. Thompkins, 49 Md. 423.

[203] Trustees of Davidson College v. Chamber's Ex'rs, 3 Jones Eq. (N. C.) 253, 1 Smith's Cas. 476; Wood v. Hammond, 16 R. I. 98; Coggeshall v. Home for Friendless Children, 18 R. I. 696; In re McGraw's Estate, 111 N. Y. 66, 1 Smith's Cas. 483, 1 Keener's Cas. 571, 2 Cum. Cas. 22.

Contra, De Camp v. Dobbins, 29 N. J. Eq. 36.

ance of a bequest to it, where the corporation has no power under its charter to hold the property.[204]

§ 235. Grant of power after testator's death.

If a devise or bequest to a corporation is void at the time of the testator's death because the corporation has no power to take the property, the right of the heirs or next of kin or the residuary devisee or legatee thereto becomes vested, and is not affected by subsequent legislation conferring additional power upon the corporation.[205]

[204] Trustees of Davidson College v. Chamber's Ex'rs, 3 Jones Eq. (N. C.) 253, 1 Smith's Cas. 476 (Nash, C. J., dissenting).

[205] Trustees of Davidson College v. Chamber's Ex'rs, 3 Jones Eq. (N. C.) 253, 1 Smith's Cas. 476; In re McGraw's Estate, 111 N. Y. 66, 1 Smith's Cas. 483, 1 Keener's Cas. 571, 2 Cum. Cas. 22.

CHAPTER XIII.

TORTS, PENALTIES, CRIMES, AND CONTEMPT OF COURT.

I. Liability of Corporations for Torts.

§ 236. In general.
237. Rule that a corporation is liable for torts.
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III. Liability of Corporations to Indictment.

§ 246. In general.
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253. Particular penalty imposed by statute.
254. Unauthorized acts of agents.
255. Corporations in the hands of a receiver.
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IV. Liability for Contempt of Court.

§ 257. In general.

I. LIABILITY OF CORPORATIONS FOR TORTS.

§ 236. In general.—Though there is some conflict in the decisions as to the liability of a corporation for the torts of its officers and agents, the following propositions are supported by the weight of authority:

(1) As a general rule, a corporation is liable, like a natural person, for torts of its officers or agents within the scope, or apparent scope, of their authority.

(2) It is liable for a tort so committed, although it involves a specific intent or malice, for the intent or malice of its officers or agents may be imputed to it.

(3) It is liable for exemplary damages, in a proper case, for the torts of its managing officers or officer, or for torts of subordinate agents authorized or ratified by them.

(4) It is liable, according to the weight of authority, although the tort may have been committed in the course of an ultra vires business or transaction, if such business or transaction was authorized by its stockholders or managing officers.

(5) It is not liable for torts of an agent not within the scope, or apparent scope, of his authority, unless it has ratified the same.

(6) Most courts hold that it is not liable as for a tort for acts clearly authorized by its charter, if the grant of authority was constitutional, and the act was done without negligence and in good faith.

(7) According to the weight of authority, a corporation organized exclusively for the purpose of a public charity is not liable to a patient or other person receiving the benefit of the charity for the torts of its agents, unless it has been negligent in selecting or retaining them.

§ 237. Rule that a corporation is liable for torts.

(a) In general.—Formerly it was considered that a corporation, because of the fact that it has such powers only as are conferred upon it by its charter, could not do acts not authorized by its charter, and it was thought, therefore, that, in the nature of things, a corporation could not commit a tort, the wrongful acts of its officers and agents being regarded as their own torts individually, and not as the torts of the corporation. This doc-

trine, however, is not now recognized in any jurisdiction. On the contrary, it is well settled that a corporation *may* exceed the powers conferred upon it by its charter, and, like a natural person, do wrong;[1] and it may therefore be guilty of a tort. In short, a corporation, except as will presently be explained, is liable for the tortious acts and omissions of its officers and agents to the same extent as a natural person would be under the same circumstances.[2]

In a leading Pennsylvania case, in which a turnpike company was held liable in an action of trespass on the case for obstructing a watercourse and overflowing land, it was said by Chief Justice Tilghman: "It is objected that the present action is not on contract but on tort, and a very refined argument is brought forward, to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorized by its charter. But the charter does not authorize it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of laborers who have no prop-

[1] See ante, § 206.

[2] Yarborough v. Bank of England, 16 East, 6, 1 Smith's Cas. 386, 1 Cum. Cas. 426; Maund v. Monmouthshire Canal Co., 4 Man. & G. 452, 1 Keener's Cas. 823, 1 Smith's Cas. 389, 1 Cum. Cas. 429; Green v. London General Omnibus Co., 7 C. B. (N. S.) 290, 1 Smith's Cas. 410, 1 Cum. Cas. 440; Eastern Counties Ry. Co. v. Broom, 6 Exch. 314, 1 Smith's Cas. 402, 1 Cum. Cas. 434; Philadelphia, Wilmington & B. R. Co. v. Quigley, 21 How. (U. S.) 202, 1 Smith's Cas. 406, 1 Cum. Cas. 453; Denver & Rio Grande Ry. Co. v. Harris, 122 U. S. 597; Southern Express Co. v. Platten (C. C. A.) 93 Fed. 936; Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353, 1 Smith's Cas. 435; Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439, 1 Smith's Cas. 415, 1 Cum. Cas. 443; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 39 Am. St. Rep. 467, 1 Smith's Cas. 430, 1 Keener's Cas. 841; Brokaw v. New Jersey Railroad & Transp. Co., 32 N. J. Law, 328, 90 Am. Dec. 659, 1 Keener's Cas. 824; New York, Lake Erie & W. Ry. Co. v. Haring, 47 N. J. Law, 137, 54 Am. Rep. 123, 1 Keener's Cas. 833, 2 Cum. Cas. 110; Fishkill Savings Institution v. National Bank of Fishkill, 80 N. Y. 162, 36 Am. Rep. 595, 1 Keener's Cas. 828; Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675, 1 Smith's Cas. 391, 1 Cum. Cas. 431. And see the cases in other jurisdictions more specifically cited in the notes following.

erty to answer the damages recovered against them. It is much more reasonable to say, that when a corporation is authorized by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants touching his business. The act of the agent is the act of the principal. There is no solid ground for a distinction between contracts and torts. Indeed with respect to torts, the opinion of the courts seems to have been more uniform than with respect to contracts. For it may be shown, that from the earliest times to the present, corporations have been held liable for torts."[3]

(b) Willful acts.—This liability of a corporation in tort for the wrongful acts of its officers and agents is not limited to acts which are not willful, but extends also to willful wrongs in any case in which a natural person would be liable for the willful act of his agent.[4] For example, a railroad company has been held liable in tort for the willful act of its conductor in kissing a lady passenger without her consent.[5] Many other cases are referred to in the following sections.

(c) Specific torts.—In accordance with this doctrine it has

[3] Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675, 1 Smith's Cas. 391, 1 Cum. Cas. 431.

[4] Green v. London General Omnibus Co., 7 C. B. (N. S.) 290, 1 Smith's Cas. 410, 1 Cum. Cas. 440; Eastern Counties Ry. Co. v. Broom, 6 Exch. 314, 1 Smith's Cas. 402, 1 Cum. Cas. 434; Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439, 1 Smith's Cas. 415, 1 Cum. Cas. 443; Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315; Rounds v. Delaware, Lackawanna & W. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 2 Am. Rep. 39; Craker v. Chicago & Northwestern Ry. Co., 36 Wis. 657, 17 Am. Rep. 504; Toledo, Wabash & W. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Chicago, Burlington & Q. R. Co. v. Dickson, 63 Ill. 151, 14 Am. Rep. 114; Evansville & Terre Haute R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; Evansville & Crawfordsville R. Co. v. Baum, 26 Ind. 70; Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; McKinley v. Chicago & Northwestern R. Co., 44 Iowa, 314, 24 Am. Rep. 748; Nashville & Chattanooga R. Co. v. Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296; Redding v. South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681; Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757. And see many other cases more specifically cited in the notes following.

[5] Craker v. Chicago & Northwestern R. Co., 36 Wis. 657, 17 Am. Rep. 504.

repeatedly been held that a corporation is liable for a trespass committed by its agent in the course of his employment, whether it be a trespass upon land,[6] or upon goods,[7] or against the person, as in assault and battery.[8] An action will lie against a corporation in trespass or trespass on the case, according to the circumstances, for a false imprisonment by its agent in the course of his employment.[9] A corporation is also liable in trover for the conversion of property by its officers or agents in the course of their employment.[10] And it is liable in an action on the case or other appropriate action for a nuisance erected, created, or maintained by its officers or agents in the

[6] Maund v. Monmouthshire Canal Co., 4 Man. & G. 452, 1 Smith's Cas. 389, 1 Keener's Cas. 823, 1 Cum. Cas. 429; Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. 6, 8 Am. Dec. 675, 1 Smith's Cas. 391, 1 Cum. Cas. 431; Foote v. City of Cincinnati, 9 Ohio, 31, 34 Am. Dec. 420. See, also, Crawfordsville & Wabash R. Co. v. Wright, 5 Ind. 252; Hazen v. Boston & Maine Railroad, 2 Gray (Mass.) 574; White v. City Council of Charleston, 2 Hill (S. C.) 571; Main v. Northeastern R. Co., 12 Rich. Law (S. C.) 82, 75 Am. Dec. 725.

A corporation is liable in an action of ejectment and in trespass for mesne profits. Dater v. Troy Turnpike & R. Co., 2 Hill (N. Y.) 629; McCready v. Guardians of the Poor, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667.

[7] Yarborough v. Bank of England, 16 East, 6, 1 Smith's Cas. 386, 1 Cum. Cas. 426; Maund v. Monmouthshire Canal Co., 4 Man. & G. 452, 1 Smith's Cas. 389, 1 Keener's Cas. 823, 1 Cum. Cas. 429.

[8] Eastern Counties Ry. Co. v. Broom, 6 Exch. 314, 1 Smith's Cas. 402, 1 Cum. Cas. 434; Brokaw v. New Jersey Railroad & Transp. Co., 32 N. J. Law, 328, 90 Am. Dec. 659, 1 Keener's Cas. 824; New York, Lake Erie & W. Ry. Co. v. Haring, 47 N. J. Law, 137, 54 Am. Rep. 123, 1 Keener's Cas. 833, 2 Cum. Cas. 110; Ramsden v. Boston & Albany R. Co., 104 Mass. 117, 6 Am. Rep. 200; Edwards v. Union Bank, 1 Branch (Fla.) 136; St. Louis, Alton & C. R. Co. v. Dalby, 19 Ill. 352; Craker v. Chicago & Northwestern Ry. Co., 36 Wis. 657, 17 Am. Rep. 504; Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Redding v. South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681; Palmer v. Charlotte, Columbia & A. R. Co., 3 S. C. 580, 16 Am. Rep. 750; Atlantic & Great Western Ry. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Southern Express Co. v. Platten (C. C. A.) 95 Fed. 936; Maisenbacker v. Society Concordia of Danbury, 71 Conn. 369, 71 Am. St. Rep. 213.

Formerly the doctrine was to the contrary. See 1 Kyd, Corp. 71; Orr v. Bank of United States, 1 Ohio, 37, 13 Am. Dec. 588.

[9] Eastern Counties Ry. Co. v. Broom, 6 Exch. 314, 1 Smith's Cas. 402, 1 Cum. Cas. 434. See infra, § 238(c), note 30.

[10] Yarborough v. Bank of England, 16 East, 6, 1 Smith's Cas. 386, 1 Cum. Cas. 426; Fishkill Savings Institution v. National Bank of Fishkill, 80 N. Y. 162, 36 Am. Rep. 595, 1 Keener's Cas. 828; Beach v. Fulton Bank, 7 Cow. (N. Y.) 485.

course of their employment;[11] or for their negligence;[12] or for infringement of a patent, trademark, or copyright.[13]

Whenever the charter of a corporation or any other statute imposes a duty upon it, neglect to perform such duty resulting in injury to others is a tort for which an action will lie against the corporation.[14]

As we shall presently see, a corporation may also be liable for torts committed by its officers or agents involving the element of evil intent or malice, as libel, malicious prosecution, etc.,[15] and fraud and deceit.[16]

(d) Action for death by wrongful act or neglect of another.—A statute providing that an action for damages may be brought

[11] Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675. 1 Smith's Cas. 391, 1 Cum. Cas. 431; Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; Burbank v. Bethel Steam Mill Co., 75 Me. 373, 46 Am. Rep. 400; Eastman v. Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1; Cogswell v. New York, New Haven & H. R. Co., 103 N. Y. 10, 57 Am. Rep. 701; McAndrews v. Collerd, 42 N. J. Law, 189, 36 Am. Rep. 508; Columbus & Hocking Coal & Iron Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528.

Thus a corporation is liable for obstructing a water course and overflowing land. Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675, 1 Smith's Cas. 391, 1 Cum. Cas. 431. See, also, Hooker v. New Haven & Northampton Co., 14 Conn. 146, 36 Am. Dec. 477; Rhodes v. City of Cleveland, 10 Ohio, 159, 36 Am. Dec. 82.

As to when the authority conferred upon a corporation by its charter is a defense in an action for a nuisance, see post, § 242.

[12] Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353, 1 Smith's Cas. 435; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 39 Am. St. Rep. 467, 1 Smith's Cas. 430, 1 Keener's Cas. 841; Denver, South Park & Pac. R. Co. v. Conway, 8 Colo. 1, 54 Am. Rep. 537; Wilson v. Rockland Mfg. Co., 2 Har. (Del.) 67; Dunn v. Brown County Agricultural Soc., 46 Ohio St. 93, 15 Am. St. Rep. 556; Hilsdorf v. City of St. Louis, 45 Mo. 94, 100 Am. Dec. 352; Macon & Augusta R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678; Brown v. South Kennebec Agricultural Soc., 47 Me. 275, 74 Am. Dec. 484; Butcher v. Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626; Lancaster Avenue Improvement Co. v. Rhoads, 116 Pa. St. 377, 2 Am. St. Rep. 608; Columbus & Hocking Coal & Iron Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528; Elmore v. Drainage Commissioners, 135 Ill. 269, 25 Am. St. Rep. 363.

[13] Betts v. Neilson, 3 Ch. App. 441.

[14] Mersey Docks v. Gibbs, 11 H. L. Cas. 686; Riddle v. Proprietors of Locks & Canals on Merrimack River, 7 Mass. 169, 5 Am. Dec. 35; City of Petersburg v. Applegarth's Adm'r, 28 Grat. (Va.) 321; Pennsylvania & Ohio Canal Co. v. Graham, 63 Pa. St. 290, 3 Am. Rep. 549.

[15] See post, § 238(a),(c).

[16] See post, § 238(b).

when the death of any person is caused by the wrongful act, negligence, or default of another gives a right of action against a corporation as well as against natural persons.[17]

§ 238. Torts involving wrongful intent or malice.

(a) In general.—It has been contended that, in the nature of things, a corporation cannot be guilty of or liable for a tort involving intention or malice, like deceit, of which an intent to defraud is an essential element, and slander, libel, malicious prosecution, etc., in which the element of malice enters, since, being impersonal and having a mere artificial existence, it cannot entertain an intent or malice. And there are some early cases in which it has been so held by the courts.[18] This view, however, cannot be sustained, and the overwhelming weight of authority is against it. It is very true that a corporation itself cannot entertain any intent or malice, but there is no reason why a specific intent or malice entertained by an officer or agent of a corporation, in doing an act for the corporation in the course of his employment, should not be imputed to the corporation, just as the act of the officer or agent is imputed to it. An act done by an officer or agent of a corporation, as such, and in the course of his employment, is in contemplation of law the act of the corporation; and, as the act is thus held to be the act of the corporation, the intent with which it is done may also be imputed to it.

(b) Deceit.—In accordance with this view it is now well settled, both in England and in this country, that fraud or deceit on the part of an officer or agent of a corporation, in transactions which are within the scope of his authority, is imputable to the corporation, not only for the purpose of avoiding con-

[17] Chase v. American Steamboat Co., 10 R. I. 79; Fleming v. Texas Loan Agency, 87 Tex. 238; Southwestern R. Co. v. Paulk, 24 Ga. 356; Donaldson v. Mississippi & Missouri R. Co., 18 Iowa, 280, 87 Am. Dec. 391.

[18] See Childs v. Bank of Missouri, 17 Mo. 213, 1 Smith's Cas. 400. This and other cases to the same effect have since been overruled. See note 30, infra.

tracts and other transactions as against the corporation,[19] but also for the purpose of an action of deceit against the corporation.[20]

In an action of deceit against a corporation for false and fraudulent representations of its agent in selling property, it was said in a Pennsylvania case: "As a corporation can only speak or act by agent, there is stronger reason for holding it answerable for the acts and representations of the agent done within the ostensible scope of his authority and while transacting the business of the principal, than where the principal is a natural person. However, *the same rule applies alike to natural and artificial persons.* 'The purchaser can maintain an action of deceit against the innocent principal, when the fraud of the agent has been committed within the scope of his authority, and where the principal has benefited by it. In this respect it makes no difference whether the principal be a corporation or an individual.'"[21]

And in an English case it was said in regard to rescission of

[19] Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 157; New Brunswick & Canada Railway & Land Co. v. Conybeare, 9 H. L. Cas. 740; McClellan v. Scott, 24 Wis. 81; Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9.

[20] Mackay v. Commercial Bank of New Brunswick, L. R. 5 P. C. 394; Ranger v. Great Western Ry. Co., 5 H. L. Cas. 72; Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259; Peebles v. Patapsco Guano Co., 77 N. C. 233, 24 Am. Rep. 447; Erie City Iron Works v. Barber, 106 Pa. St. 125, 51 Am. Rep. 508; Candy v. Globe Rubber Co., 37 N. J. Eq. 175; Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9; Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596; Fifth Ave. Bank v. Forty Second St. & Grand St. Ferry R. Co., 137 N. Y. 231, 33 Am. St. Rep. 712; Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290; Zinc Carbonate Co. v. First Nat. Bank of Shullsburg, 103 Wis. 125; Breyfogle v. Walsh (C. C. A.) 80 Fed. 172.

[21] Erie City Iron Works v. Barber, 106 Pa. St. 125, 51 Am. Rep. 508.

"Strictly speaking," said Lord Cranworth in an English house of lords case, "a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation." Ranger v. Great Western Ry. Co., 5 H. L. Cas. 86.

a contract for fraud: "Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which it has obtained through the fraud of its agents."[22]

(c) Torts involving malice, etc.—It has been said that a corporation cannot be liable for a slander or oral defamation by its officers or agents, as "there can be no agency to slander;"[23] and the opinion has also been expressed that a corporation, because of its impersonal nature, cannot commit torts involving the element of malice, since, to support an action for such a tort, "it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind."[24] This reasoning, however, is unsound. A corporation, it is true, has no mind, and cannot itself entertain malice, but its officers and agents may, and their mental attitude, including their malice, may, like their consent to a contract or their physical acts, be imputed to the corporation. It is well settled, therefore, for this reason, that a corporation may, to the same extent as a natural principal, be liable for the malicious wrongs of its officers or agents, if committed in the course of a transaction which is within the scope of their authority.[25]

"The whole course of the authorities * * * shews,"

[22] Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 157.

[23] Townshend, Slander & Libel, § 265.

[24] Alderson, B., in Stevens v. Midland Counties Ry. Co., 10 Exch. 352; McLellan v. Cumberland Bank, 24 Me. 566; Childs v. Bank of Missouri, 17 Mo. 213, 1 Smith's Cas. 400 (overruled by Boogher v. Life Association of America, 75 Mo. 319, 42 Am. Rep. 413); Owsley v. Montgomery & West Point R. Co., 37 Ala. 560 (overruled by Jordan v. Alabama Great Southern R. Co., 74 Ala. 85, 49 Am. Rep. 800).

[25] Green v. London General Omnibus Co., 7 C. B. (N. S.) 290, 1 Smith's Cas. 410, 1 Cum. Cas. 440; Philadelphia, Wilmington & B. R. Co. v. Quigley, 21 How. (U. S.) 202, 1 Smith's Cas. 406, 1 Cum. Cas. 453; Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec.

said Chief Justice Erle in a leading English case, "that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation,[26] and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on (by the defendant) that a corporation, having no soul, cannot be actuated by a malicious intention,—is more quaint than substantial."[27]

—**Specific torts.**—Thus, it has been held that a corporation may, to the same extent as an individual, be liable in an action for libel,[28] or, it seems, for slander,[29] or in an action for ma-

439, 1 Smith's Cas. 415, 1 Cum. Cas. 443; Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U. S. 101, 1 Smith's Cas. 423; Jordan v. Alabama Great Southern R. Co., 74 Ala. 85, 49 Am. Rep. 800; Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 47 Cal. 207, 91 Am. Dec. 672; Carter v. Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311; Reed v. Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Fogg v. Boston & Lowell R. Corp., 148 Mass. 513, 12 Am. St. Rep. 583; Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426; Boogher v. Life Association of America, 75 Mo. 319, 42 Am. Rep. 413; Vance v. Erie Ry. Co., 32 N. J. Law, 334, 90 Am. Dec. 665; Buffalo Lubricating Oil Co. v. Standard Oil Co., 38 Hun (N. Y.) 637, 106 N. Y. 669; Atlantic & Great Western Ry. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Wheless v. Second Nat. Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783. And see the other cases more specifically cited in the notes following.

[26] As to this point, however, see post, § 240.

[27] Green v. London General Omnibus Co., 7 C. B. (N. S.) 290, 1 Smith's Cas. 410, 1 Cum. Cas. 400.

[28] Philadelphia, Wilmington & B. R. Co. v. Quigley, 21 How. (U. S.) 202, 1 Smith's Cas. 406, 1 Cum. Cas. 453. And see Whitfield v. South Eastern Ry. Co., El., Bl. & El. 115; Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 47 Cal. 207, 91 Am. Dec. 672; Howe Machine Co. v. Souder, 58 Ga. 64; Fogg v. Boston & Lowell R. Corp., 148 Mass. 513, 12 Am. St. Rep. 583; Detroit Daily Post Co. v. Arthur, 16 Mich. 447; Bacon v. Michigan Cent. R. Co., 55 Mich. 224, 54 Am. Rep. 372; Aldrich v. Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84; Hewitt v. Pioneer Press Co., 23 Minn. 178, 23 Am. Rep. 680; Johnson v. St. Louis Dispatch Co., 2 Mo. App. 565, 65 Mo. 539, 27 Am. Rep. 293; McDermott v. Evening Journal Ass'n, 43 N. J. Law, 488, 39 Am. Rep. 606; Evening Journal Ass'n v. McDermott, 44 N. J. Law, 430, 43 Am. Rep. 392; Hoboken Printing & Pub. Co. v. Kahn, 59 N. J. Law, 218, 59 Am. St. Rep. 585; Samuels v. Evening Mail Ass'n, 9 Hun (N. Y.) 288; Times Pub. Co. v. Carlisle (C. C. A.) 94 Fed. 762; Vinas v. Merchants' Mut. Ins. Co., 27 La. Ann. 367; Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 15 Am. St. Rep. 794; Union Central Life Ins. Co. of Cincinnati v. Mutual Benefit Life Ins. Co. of New Jersey, 5 Ohio Dec. 521, 6 Am. Law Reg. 382; Peterson v. Western Union Tel. Co., 75 Minn. 368, 74 Am. St. Rep. 502.

Compare Henry v. Pittsburgh & Lake Erie R. Co., 139 Pa. St. 289.

[29] See the dictum in Gilbert v.

licious criminal prosecution or malicious false arrest or imprisonment,[30] for malicious prosecution of a civil action, attachment, or other proceeding,[31] for malicious interference with the business of another,[32] for making a false return to a writ, as a writ of *mandamus*, for example,[33] and for conspiracy,[34] all of which offenses involve a mental element.

Crystal Fountain Lodge, 80 Ga. 284, 12 Am. St. Rep. 255; Hussey v. Norfolk Southern R. Co., 98 N. C. 34, 2 Am. St. Rep. 312.

While it is true that a corporation cannot itself speak and therefore cannot itself slander, neither can a corporation itself make false representations, and yet a corporation may be liable for the false representations of its agents. For the same reason, it may be liable for a slander by its agents.

[30] Copley v. Grover & Baker Sewing Machine Co., 2 Woods, 494, Fed. Cas. No. 3,213; Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U. S. 101, 1 Smith's Cas. 423; Jordan v. Alabama Great Southern R. Co., 74 Ala. 85, 49 Am. Rep. 800; Boogher v. Life Association of America, 75 Mo. 319, 42 Am. Rep. 413; Reed v. Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Williams v. Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494; Carter v. Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311; Baltimore & Yorktown Turnpike Road v. Green, 86 Md. 161; Turner v. Phoenix Ins. Co., 55 Mich. 236; Ricord v. Central Pac. R. Co., 15 Nev. 167; Vance v. Erie Ry. Co., 32 N. J. Law, 334, 90 Am. Dec. 665; Scott v. Dennett Surpassing Coffee Co., 51 App. Div. (N. Y.) 321; Morton v. Metropolitan Life Ins. Co., 34 Hun (N. Y.) 366, 103 N. Y. 645; Willard v. Holmes, Booth & Haydens, 142 N. Y. 492; Hussey v. Norfolk Southern R. Co., 98 N. C. 34, 2 Am. St. Rep. 312; Ricord v. Central Pac. R. Co., 15 Nev. 167; Wheless v. Second Nat. Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783; Atchison, Topeka & S. F. R. Co. v. Brown, 57 Kan. 785; Edwards v. Midland Ry. Co., 6 Q. B. Div. 287; Pennsylvania Co. v. Weddle, 100 Ind. 138; Springfield Engine & Threshing Co. v. Green, 25 Ill. App. 106; Krulevitz v. Eastern R. Co., 140 Mass. 573; Manasha v. Royal Ben. Soc., 20 Misc. Rep. (N. Y.) 732, 21 Misc. Rep. 474; Eastern Counties Ry. Co. v. Broom, 6 Exch. 314, 1 Smith's Cas. 402, 1 Cum. Cas. 434.

Jordan v. Alabama Great Southern R. Co., 74 Ala. 85, 49 Am. Rep. 800, and Boogher v. Life Association of America, 75 Mo. 319, 42 Am. Rep. 413, respectively overruled Owsley v. Montgomery & West Point R. Co., 37 Ala. 560; Childs v. Bank of Missouri, 17 Mo. 213, 1 Smith's Cas. 400; and Gillett v. Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653.

[31] Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439, 1 Smith's Cas. 415, 1 Cum. Cas. 443; Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571; Jefferson County Sav. Bank v. Eborn, 84 Ala. 529; Western News Co. v. Wilmarth, 33 Kan. 510; Wheless v. Second Nat. Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783.

[32] Green v. London General Omnibus Co., 7 C. B. (N. S.) 290, 1 Smith's Cas. 410, 1 Cum. Cas. 440; Buffalo Lubricating Oil Co. v. Standard Oil Co., 38 Hun (N. Y.) 637, 106 N. Y. 669; Merrills v. Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682.

[33] Argent v. Dean & Chapter of St. Paul's, cited in Yarborough v. Bank of England, 16 East, 6, 1 Smith's Cas. 386, 1 Cum. Cas. 426.

[34] Dodge v. Bradstreet Co., 59

—**Reasoning on which this doctrine is based.**—In a leading Connecticut case, in which it was held that a banking corporation could be liable in an action for malicious prosecution of a civil action, Chief Justice Church said: "The objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort, which essentially consists in motive and intention. The claim is, that as a corporation is ideal only, it cannot act from malice, and therefore, cannot commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one,—they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say, that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned, by the bank, in the usual modes of its action; and still to claim, that, although the acts were those of the bank, the intention was only that of the indi-

How. Pr. (N. Y.) 104; Buffalo Lubricating Oil Co. v. Standard Oil Co., 38 Hun (N. Y.) 637, 106 N. Y. 669; Zinc Carbonate Co. v. First Nat. Bank of Shellsburg, 103 Wis. 125, 74 Am. St. Rep. 845; Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290.

In Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, it was held that, if the directors of a corporation and the holders of the greater number of its shares of stock, knowing it to be insolvent, enter into a scheme to fraudulently increase its capital stock, representing and pretending that it is not indebted, and that the increase is solely for the purpose of enabling it to enlarge its business, and that it is and has been prosperous and successful, and thereby induce persons to purchase and pay for the new stock, the corporation, as well as the guilty directors and stockholders, is answerable for the damages sustained by such purchasers, in an action for the conspiracy and fraud.

vidual directors, is a distinction too refined, we think, for practical application."[35]

In a California case in which a corporation was held liable in an action for libel, it was said: "The claim for immunity to associations of men constituting bodies corporate, is that corporations are mere legal entities which can only be conceived of and apprehended as existing in abstract contemplation; and that being mere legal entities, they are utterly incapable of malevolence, and are without the power to will good or evil. If it be conceded that a corporation in its nature and essence exists in idea only, it must be admitted that in its manifested power there is always to be recognized the guiding and controlling hand of human intelligence, which is the agency by means whereof its purposes are carried into effect. It is argued that a corporation with certain defined powers and privileges, and no implied powers, cannot do a wrong of the nature of that complained of, because the commission of such wrong by the representative authority of the body politic and corporate is not within the scope of the objects and purposes of the corporation, and therefore the stockholders, who may have had no malice toward the plaintiff and no immediate agency in the publication of the alleged libel, should not be required to respond in damages for the wrong done by the directors. This argument carried to every legitimate consequence would result in entire immunity to a corporation for all wrongs which might be committed by its officers, agents and servants; because the objects and purposes of a corporation, ascertained from the organic law of its being, do not embrace the right and privilege of committing torts. But the cases are numerous showing that for acts done by the agents of a corporation, *in delicto,* as well as *in contractu,* in the course of its business, and in their employment, the corporation is responsible, as an individual is responsible under similar circumstances. * * * The directors are the chosen representatives of the corporation, and

[35] Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 443. 439, 1 Smith's Cas. 415, 1 Cum. Cas.

constitute, as already observed, to all purposes of dealing with others, the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do an injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case."[36]

§ 239. Liability for exemplary damages.

In the case of actual fraud, and in the case of torts committed with actual malice or wantonly and oppressively, and in cases of gross negligence, a jury is allowed to give the person injured exemplary or punitive damages, as well as such damages as will compensate him for the actual injury. And since a corporation may, in contemplation of law, be actuated by malice, etc., the state of mind as well as the conduct of its officers and agents being imputable to it, it follows that a corporation may, in a proper case, be held liable, like a natural person, for exemplary damages. In other words, there is nothing in the nature of a corporation to prevent such damages from being awarded against it.[37] The courts, however, do not agree as to the circumstances under which it is proper to give such damages against a corporation.

[36] Currey, C. J., in Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 56, 91 Am. Dec. 672.

[37] Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U. S. 101, 1 Smith's Cas. 423; Denver & Rio Grande Ry. Co. v. Harris, 122 U. S. 597; Louisville & Nashville R. Co. v. Whitman, 79 Ala. 328; Alabama Great Southern R. Co. v. Sellers, 93 Ala. 9, 30 Am. St. Rep. 17; Jefferson County Sav. Bank v. Eborn, 84 Ala. 529; Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; Western Union Tel. Co. v. Eyser, 2 Colo. 141; Maisenbacker v. Society Concordia of Danbury, 71 Conn. 369; Jeffersonville R. Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Gasway v. Atlantic & West Point R. Co., 58 Ga. 216; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571; Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 2 Am. Rep. 39; Baltimore & Yorktown Turnpike Road v. Boone, 45 Md. 344; Philadelphia, Wilmington & B. R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; New Orleans, Jackson & G. N. R. Co. v. Bailey, 40 Miss. 395; Pullman Palace Car Co. v. Lawrence, 74 Miss. 782; Hopkins v. Atlantic & St. Lawrence R. Co., 36 N. H. 9, 72 Am. Dec. 287; Cleghorn v. New York Central & Hudson River R. Co., 56 N. Y. 44, 15 Am. Rep. 375;

When exemplary damages may be awarded.—Exemplary or punitive damages are awarded, as the terms imply, not by way of compensation to the sufferer, but by way of punishment of the wrongdoer, and as an example or warning to others, and they can only be awarded against one who has participated in the offense. By the weight of authority, therefore, a principal, although he is liable to make *compensation* for injuries done or inflicted by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages *merely* by reason of wanton, oppressive, or malicious intent upon the part of the agent. In order that the principal may be liable, there must have been some participation on his part.[38]

Applying this doctrine to corporations, it has been held that where the managing officers or officer of a corporation, as the directors, the president, or vice president, etc., commit a tort themselves, while acting for the corporation and within the scope of their authority, with wantonness, oppressiveness, or malice, or if they authorize or ratify such a tort by a subordinate agent, or if they employ or retain a subordinate agent or servant, knowing that he is incompetent or unfit, and he commits such a tort because of his incompetency or unfitness, in either case the malice, wantonness, or oppression is imputable to the corporation, and exemplary damages may be given against it.[39]

Doss v. Missouri, Kansas & T. R. Co., 59 Mo. 27, 21 Am. Rep. 371; Palmer v. Charlotte, Columbia & A. R. Co., 3 S. C. 580, 16 Am. Rep. 750; Pittsburgh, Ft. Wayne & C. R. Co. v. Slusser, 19 Ohio St. 157; Atlantic & Great Western Ry. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Haley v. Mobile & Ohio R. Co., 7 Baxt. (Tenn.) 239; Louisville & Nashville R. Co. v. Garrett, 8 Lea (Tenn.) 438, 41 Am. Rep. 640; Hays v. Houston & Great Northern R. Co., 46 Tex. 272; Galveston, Harrisburg & S. A. Ry. Co. v. Donahoe, 56 Tex. 162; International & Great Northern R. Co. v. Telephone & Telegraph Co., 69 Tex. 277; Bass v. Chicago & Northwestern Ry. Co., 42 Wis. 654, 24 Am. Rep. 437; Times Pub. Co. v. Carlisle (C. C. A.) 94 Fed. 762; Missouri Pacific Ry. Co. v. Richmond, 73 Tex. 568, 15 Am. St. Rep. 794; Peterson v. Western Union Tel. Co., 75 Minn. 368, 74 Am. St. Rep. 502; West v. Western Union Tel. Co., 39 Kan. 93, 7 Am. St. Rep. 530; Hoboken Printing & Publishing Co. v. Kahn, 59 N. J. Law, 218, 59 Am. St. Rep. 585.

For a valuable note on this subject, see 59 Am. St. Rep. 589-609.

[38] Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U. S. 101, 1 Smith's Cas. 423.

[39] Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U. S.

But it is otherwise where the managing officers of a corporation employ or retain a subordinate agent or servant without knowledge or reason to know that he is incompetent or unfit, and he commits a wanton, oppressive, or malicious tort in the course of his employment, without authority from or ratification by them. In such a case, by the weight of authority, the wantonness, oppressiveness, or malice of the subordinate agent or servant is not imputable to the corporation, and it is not liable for exemplary damages. It was so held in a late case in the supreme court of the United States, where it was sought to hold a railroad company liable for a wanton, oppressive, and malicious assault committed by its conductor, and there are many other cases to substantially the same effect.[40]

Though the doctrine and distinction above stated are supported by the decided weight of authority, there are cases in some states in which the wantonness and malice of subordinate agents and servants of a corporation in the course of their employment has been imputed to the corporation, although it was not authorized or ratified by the managing officers of the corporation, and although it did not appear that there was any negligence or misconduct on their part in employing or retaining the agent or servant.[41]

101, 1 Smith's Cas. 423; Denver & Rio Grande Ry. Co. v. Harris, 122 U. S. 597; Milwaukee & St. Paul Ry. Co. v. Arms, 91 U. S. 489; Merrills v. Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682; Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Cleghorn v. New York Cent. & Hudson River R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Bass v. Chicago & Northwestern Ry. Co., 42 Wis. 654. 24 Am. Rep. 437; and other cases cited in note 37, supra. See, also, Bell v. Midland Ry. Co., 10 C. B. (N. S.) 287.

[40] Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U. S. 101, 1 Smith's Cas. 423 (explaining and distinguishing Denver & Rio Grande Ry. Co. v. Harris, 122 U. S. 597); Wardrobe v. California Stage Co., 7 Cal. 118, 68 Am. Dec. 231; Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Cleghorn v. New York Cent. & Hudson River R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Kutner v. Fargo, 20 Misc. Rep. (N. Y.) 207; Hogan v. Providence & Worcester R. Co., 3 R. I. 88; Perkins v. Missouri, Kansas & T. R. Co., 55 Mo. 201; Hayes v. Houston & Great Northern R. Co., 46 Tex. 272; Houston & Texas Cent. Ry. Co. v. Cowser, 57 Tex. 293; Arkansas Construction Co. v. Eugene, 20 Tex. Civ. App. 601.

[41] Hopkins v. Atlantic & St. Lawrence R. Co., 36 N. H. 9, 72

§ 240. Torts in ultra vires business or transaction.

In some cases it has been held that if the officers of a corporation engage in an *ultra vires* business or transaction, and a tort is committed in the course of such business or transaction, either by the managing officers, or by a subordinate agent under authority from them, the corporation is not liable. Thus, in a Maryland case, where a national bank had engaged in the business of selling the bonds of a railroad company on commission, and the teller of the bank made false and fraudulent representations to induce a person to purchase bonds, it was held that an action for the deceit would not lie against the bank. The decision was based by the court, not on the ground that the teller was not authorized by the managing officers of the bank to make the sale, but on the ground that the business was *ultra vires,* and on this ground only.[42]

This view, however, cannot be sustained, and the great weight of authority is against it. If a subordinate agent or

Am. Dec. 287; Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 2 Am. Rep. 39; Atlantic & Great Western Ry. Co. v. Dunn, 19 Ohio St. 162, 590, 2 Am. Rep. 382.

[42] Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95, 2 Cum. Cas. 104. The court said: "We are clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on; and being thus beyond its corporate powers, the defense of ultra vires is open to the appellee (the corporation). And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question." See, to the contrary, Searle v. First Nat. Bank of Montrose, 2 Walk. (Pa.) 395 (infra, note 50).

There are other cases to the same effect. Thus, in a Georgia case it was held that a railroad company which had entered into a partnership for the business of running a line of steamboats was not liable as a partner in tort for injury to a passenger on one of the boats, as the partnership was ultra vires. Gunn v. Central Railroad & Banking Co., 74 Ga. 509, 2 Cum. Cas. 111.

And in an Iowa case it was held that an incorporated agricultural society, which had entered into an ultra vires contract employing others to run conveyances to and from its fair grounds for the purpose of transporting persons attending the same, was not liable for injuries caused by the negligence of a person so employed. Bathe v. Decatur County Agricultural Soc., 73 Iowa, 11, 5 Am. St. Rep. 651.

See, also, Haag v. Vanderburg County Com'rs, 60 Ind. 511, 28 Am. Rep. 654; Gillett v. Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653.

servant of a corporation engages in an *ultra vires* transaction without any authority from the managing officers, and commits a tort in the course of such transaction, the corporation is not liable. But this is because his act is not authorized by the corporation, and not merely because it is beyond the powers conferred upon the corporation by its charter. A very different case is presented when the stockholders of a corporation at a corporate meeting, or the directors or managing officers, authorize or engage in an *ultra vires* business or transaction In such a case the business is that of the corporation, though unauthorized by its charter, and for torts committed in the course of such business it is liable. A corporation, though it has no right to engage in an *ultra vires* business, has the capacity to do so. It may do wrong. If it does so, and thereby injures others, public policy requires that it shall answer in damages; and the doctrine that it is liable in such a case is well supported by authority.[43]

"Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application."[44] "It would indeed be an anomalous result in legal science," said Chief Justice Beasley in a New Jersey case, "if a corporation should be permitted to set up that inasmuch as a

[43] Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 39 Am. St. Rep. 467, 1 Smith's Cas. 430, 1 Keener's Cas. 841; Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353, 1 Smith's Cas. 435; Salt Lake City v. Hollister, 118 U. S. 256, 1 Keener's Cas. 835, 2 Cum. Cas. 107; First Nat. Bank of Carlisle v. Graham, 100 U. S. 699; New York, Lake Erie & W. Ry. Co. v. Haring, 47 N. J. Law, 137, 54 Am. Rep. 123, 1 Keener's Cas. 833, 2 Cum. Cas. 110; Hutchinson v. Western & Atlantic R. Co., 6 Heisk. (Tenn.) 634, 2 Cum. Cas. 102; Searle v. First Nat. Bank of Montrose, 2 Walk. (Pa.) 395; Bissell v. Michigan Southern R. Co., 22 N. Y. 258, 1 Smith's Cas. 522, 1 Cum. Cas. 187; Gruber v. Washington & Jamesville R. Co., 92 N. C. 1; Hussey v. Norfolk Southern R. Co., 98 N. C. 34, 2 Am. St. Rep. 312; First Nat. Bank of Monmouth v. Strang, 138 Ill. 347; South & North Alabama R. Co. v. Chappell, 61 Ala. 527; Alexander v. Relfe, 74 Mo. 495; Hutchinson v. Western & Atlantic R. Co., 6 Heisk. (Tenn.) 634; Zinc Carbonate Co. v. First Nat. Bank of Shullsburg, 103 Wis. 125, 74 Am. St. Rep. 845; and other cases cited in the notes following.

[44] Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. (U. S.) 604; First Nat. Bank of Carlisle v. Graham, 100 U. S. 699.

"A corporation," it was said in a New York case, "is liable to the

branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrong by way of defense. If corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies are, in a sense, *ultra vires,* and if the want of a franchise to do the tortious act be a defense, then corporations have a dispensation from liability for these acts peculiar to themselves."[45]

Illustrations.—In accordance with this doctrine it has been held that a railroad company, if it engages in the *ultra vires* business of running a steamboat, horse-car, or stage line in connection with its road, is liable for injuries caused by the negligence or other torts of its agents or servants in the conduct of such business;[46] that railroad companies which enter into an *ultra vires* consolidation agreement are liable for injury to a passenger and his baggage from negligence in the joint operation of their roads;[47] and that a corporation created for educational purposes, if it engages in the *ultra vires* business of operating a public ferry and carrying passengers for hire, is liable for injury to a passenger caused by the negligence of the ferryman in managing a boat.[48]

same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party, for every grade and description of forcible, malicious or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be." New York & New Haven R. Co. v. Schuyler, 34 N. Y. 30.

[45] New York, Lake Erie & W. Ry. Co. v. Haring, 47 N. J. Law, 137, 54 Am. Rep. 123, 1 Keener's Cas. 833, 2 Cum. Cas. 110.

[46] Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353, 1 Smith's Cas. 435; Hutchinson v. Western & Atlantic R. Co., 6 Heisk. (Tenn.) 634, 2 Cum. Cas. 102; New York, Lake Erie & W. Ry. Co. v. Haring, 47 N. J. Law, 137, 54 Am. Rep. 123, 1 Keener's Cas. 833, 2 Cum. Cas. 110; Buffett v. Troy & Boston R. Co., 40 N. Y. 168; Gruber v. Washington & Jamesville R. Co., 92 N. C. 1. And see South Wales Ry. Co. v. Redmond, 10 C. B. (N. S.) 675.

[47] Bissell v. Michigan Southern R. Co., 22 N. Y. 258, 1 Smith's Cas. 522, 1 Cum. Cas. 187.

[48] Nims v. Mt. Hermon Boys'

It has also been held that, when a coporation becomes a bailee of property, it cannot escape liability in tort for conversion of the property, or for loss or injury due to its negligence, on the ground that the contract of bailment was not authorized by its charter.[49] Where the cashier of a national bank bought and sold stock for customers of the bank in its name, with the knowledge of the directors, the bank was held liable in a Pennsylvania case, contrary to the Maryland decision above mentioned, for stocks embezzled by the cashier, notwithstanding the fact that it was *ultra vires* for the bank to thus deal in stocks.[50]

§ 241. Unauthorized acts of agents.

A natural principal is not responsible for the wrongful acts of his agent unless the act is expressly authorized by the principal, or is within the scope of the authority apparently conferred upon the agent, or unless it is ratified by the principal. And the same is true with respect to the liability of a corporation for the wrongful acts of its agents. This question, however, has nothing to do with the powers of a corporation. It relates merely to the liability of a corporation for the acts of its agents, assuming that such acts are within its powers, and will therefore be dealt with in a subsequent chapter.[51]

§ 242. Effect of legislative authority.

It has often been held that when an act authorized by the legislature, acting within its constitutional powers, is done by a corporation with due care and in good faith, the corporation is not liable to persons injured by the act in an action for trespass, nuisance, etc., but that the remedy, if there is any at all, is that provided by the statute. "If the thing done," it was said

School, 160 Mass. 177, 39 Am. St. Rep. 467, 1 Smith's Cas. 430, 1 Keener's Cas. 841.

[49] First Nat. Bank of Monmouth v. Strang, 138 Ill. 347; First Nat. Bank of Carlisle v. Graham, 100 U. S. 699.

[50] Searle v. First Nat. Bank of Montrose, 2 Walk. (Pa.) 395. See the Maryland case in note 42, supra.

[51] Post, chapter XXIV.

in an English case, "is within the statute, it is clear that no compensation can be afforded for any damages sustained thereby, except so far as the statute itself has provided it, and this is clear on the legal presumption that the act creating the damage being within the statute must be a lawful act."[52] In such a case, if the statute provides no remedy, the damage is *damnum absque injuria*.[53] This doctrine has most frequently been applied where persons have sought to recover against railroad companies for damages caused by the operation of their road;[54] where it has been sought to recover for damage to adjoining

[52] Duncan v. Findlater, 6 Clark & F. 894, 907.

[53] Whitehouse v. Birmingham Canal Co., 27 Law J. Exch. 25; Hammersmith & City Ry. Co. v. Brand, L. R. 4 H. L. 171; Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 243; Hazen v. Essex Co., 12 Cush. (Mass.) 475; Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466; Gowen v. Penobscot R. Co., 44 Me. 140; Lawler v. Baring Boom Co., 56 Me. 443; Pumpelly v. Green Bay & Mississippi Canal Co., 13 Wall. (U. S.) 166; Burroughs v. Housatonic R. Co., 15 Conn. 124, 38 Am. Dec. 64; Parrot v. Cincinnati, Hamilton & D. R. Co., 10 Ohio St. 624; Baxter v. Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Parker v. Cutler Milldam Co., 20 Me. 353, 37 Am. Dec. 56; Bailey v. Philadelphia, Wilmington & B. R. Co., 4 Har. (Del.) 389, 44 Am. Dec. 593. And see Hollister v. Union Co., 9 Conn. 436, 25 Am. Dec. 36.

"When the legislature authorizes an act," said the Massachusetts court, "the necessary and natural consequence of which is damage to the property of another, he who does the act cannot be complained of as a trespasser or wrongdoer." Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466.

[54] Thus it has been held that a railroad company operating its road with due care under authority conferred by its charter is not liable to adjoining landowners for damages caused by smoke, noise, vibration, etc., from operation of its trains, unless such liability is imposed by its charter or by some other statute. Hammersmith & City Ry. Co. v. Brand, L. R. 4 H. L. 171; Glasglow Union Ry. Co. v. Hunter, L. R. 2 H. L. Sc. 78.

On the same principle, it has been held that a railroad company operating its road within the authority conferred by its charter, and with due care, is not liable to adjoining landowners for loss by fire caused by the emission of sparks from its locomotives. Frankford & Bristol Turnpike Co. v. Philadelphia & Trenton R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Burroughs v. Housatonic R. Co., 15 Conn. 124, 38 Am. Dec. 64; Michigan Cent. R. Co. v. Anderson, 20 Mich. 244; Smith v. Old Colony & Newport R. Co., 10 R. I. 22; Chapman v. Atlantic & St. Lawrence R. Co., 37 Me. 92.

It has also been held that a railroad company which is authorized to construct and operate its road across a public highway, and to maintain gates across the highway, is not liable to a traveler on the highway who is delayed by the closing of the gates during passage of a train. Caledonian Ry. Co. v. Ogilvy, 2 Macq. H. L. Cas. 229.

It has also been held that a railroad company constructing and maintaining its road across a public highway under authority conferred by its charter is not, in the

land from the construction or maintenance of a canal under authority from the legislature,[55] and like cases; but it is by no means limited to such cases.

Of course, if a charter is unconstitutional, it affords no protection to those acting under it.[56]

View that this doctrine does not apply to private corporations.—This doctrine is well settled in England and in most jurisdictions in this country, but it is not recognized to the full extent in all jurisdictions. Some courts have restricted it to public corporations exercising powers for the benefit of the public, and have held that private corporations, including railroad companies, are liable for injuries caused to the property of others, though the injury is done in the exercise of powers conferred upon them by the legislature, and though they are not guilty of negligence.

Thus, in a Maryland case it was held that a railroad company which caused injury to abutting property by making a tunnel in a street was liable therefor, although authorized to do so both by the municipality and by the state legislature, and although it used due care to avoid the injury. "Notwithstanding authority may have been obtained both from the city and state legislature, to make the extraordinary use of the street," said the court, "yet that authority must be exercised at the peril of the party to whom it is delegated; and if any injury accrues to private property in the exercise of the power the party producing it must be held liable. If * * * the injury be produced by the careless or negligent exercise of the authority, then there can be no question of the liability; but if due care be exercised, and the injury is the natural or inevitable result

absence of negligence, liable to the owner of adjoining land because he is impeded in going to and from his house, or because his horses are frightened by noise from passing trains. Caledonian Ry. Co. v. Ogilvy, 2 Macq. H. L. Cas. 229.

[55] Whitehouse v. Birmingham Canal Co., 27 Law J. Exch. 25; Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466.

[56] Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407; Hamilton County v. Cincinnati & Wooster Turnpike Co., Wright (Ohio) 603.

of the consequence of the doing the act authorized to be done, then, in a case like the present, the party doing the act and producing the injury, must indemnify the sufferer. That there was no negligence or want of care in doing the work is no answer in a case like this."[57]

Constitutional prohibition against taking property without compensation.—In most of the states in this country it is now provided by the constitution or bill of rights that private property shall not be taken or appropriated to public uses without compensation to the owner, and it has been held that the destruction of private property, either total or partial, or the diminution of its value by an act which directly affects it, which deprives the owner of the ordinary use of it, is a taking, within the meaning of this provision. If the legislature, therefore, where there is such a provision, authorizes an improvement, like the construction of a canal or railroad, for example, the execution of which will require or cause the destruction of private property, or a diminution of its value, without affording means of relief and indemnification, the owner of the property destroyed or injured may maintain an action at common law for his damages against the corporation causing the injury. Although it might be lawful to do what the legislature should authorize, said the Massachusetts court, yet, to enforce the principles of the constitution for the security of private property, it would be necessary to consider such a legislative act as inoperative, so far as it trenched upon the right of individuals.[58]

[57] Baltimore & Potomac R. Co. v. Reaney, 42 Md. 117. And see Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1; Trenton Water Power Co. v. Raff, 36 N. J. Law, 335; Sinnickson v. Johnson, 17 N. J. Law, 129, 34 Am. Dec. 184; Crittenden v. Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462; Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317; Evansville & Crawfordsville R. Co. v. Dick, 9 Ind. 433; Indiana Cent. Ry. Co. v. Boden, 10 Ind. 96; New Albany & Salem R. Co. v. Huff, 19 Ind. 315.

[58] Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466. See, also, Hooker v. New Haven & Northampton Co., 14 Conn. 146, 36 Am. Dec. 477; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1; Trenton Water Power Co. v. Raff, 36 N. J. Law, 335; Eaton v. Boston, Concord & M. R. Co., 51 N. H. 504, 12 Am. Rep. 147.

In Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, it

Acts in excess of authority conferred.—In no jurisdiction can a corporation set up the authority conferred by its charter to defeat an action for a tort, unless the act by which the injury was caused was clearly within the authority conferred upon it.[59] And it is well settled that when a corporation claims authority from the legislature for doing an act causing injury to others, and which would constitute a nuisance or trespass without such authority, the charter is to be strictly construed against the corporation and in favor of the public. No act which would be a tort, if unauthorized, is to be regarded as authorized, unless authority to do the very act is conferred in express terms or by necessary implication.[60]

Negligence in exercising authority.—When the legislature authorizes a corporation to do an act which may result in injury to others, it is always implied that the corporation shall use due care to prevent injury. If a corporation, therefore, fails to use due care in the exercise of an authority conferred upon it by its charter, and as a result of its negligence another is in-

was said: "Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such interference with private property."

[59] Great Western Ry. Co. v. May, L. R. 7 H. L. 283; Attorney General v. Mid-Kent Ry. Co., 3 Ch. App. 100; Simpson v. South Staffordshire Water Works Co., 4 De Gex., J. & S. 679; Hazen v. Boston & Maine Railroad, 2 Gray (Mass.) 574; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1; Cogswell v. New York, New Haven & H. R. Co., 103 N. Y. 10, 57 Am. Rep. 701.

[60] Cogswell v. New York, New Haven & H. R. Co., 103 N. Y. 10, 57 Am. Rep. 701; Hooker v. New Haven & Northampton Co., 14 Conn. 146, 36 Am. Dec. 477; Eastman v. Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Eaton v. Boston, Concord & M. R. Co., 51 N. H. 504, 12 Am. Rep. 147; Coolidge v. Williams, 4 Mass. 140; Snell v. Buresh, 123 Ill. 151; Alton & U. A. Horse Railway & Carrying Co. v. Deitz, 50 Ill. 210; Newark Plank Road & Ferry Co. v. Elmer, 9 N. J. Eq. 754; McAndrews v. Collerd, 42 N. J. Law, 189, 36 Am. Rep. 508; Brown v. Cayuga & Susquehanna R. Co., 12 N. Y. 491; Indianapolis, Bloomington & W. Ry. Co. v. Smith, 52 Ind. 428; Lexington & Ohio R. Co. v. Applegate, 8 Dana (Ky.) 289, 33 Am. Dec. 497; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18.

jured in his person or property, the authority conferred by its charter does not exempt it from liability.[61]

For example, a corporation authorized by its charter to mine coal has no greater rights than those of private persons engaged in the same business, and must, to the same extent as private persons, so carry on their business as not to negligently injure other persons in the enjoyment of their property rights. If such a company so places its slack and refuse upon the surface of its own land that they may be expected, in the ordinary course of events, to wash down and finally reach the lands of others, to their damage, the corporation is liable to a landowner injured by the washing of such slack and refuse into a creek running through his land, causing it to overflow its banks, inundate the land, and cover parts of it with debris. And the corporation cannot escape liability on the ground that it was merely carrying on the business authorized by its charter. "That the coal company is a corporation," said the court in such a case, "can make no difference. Its rights are just as great, and no greater, than those of a private person in the same business. That it is authorized by its charter to mine coal generally in the state cannot enlarge its rights in any particular locality. Even had its charter empowered it to establish a business and carry it on in a particular place, it cannot be presumed that the state intended to authorize it to carry on the business in a manner destructive of the property rights of others without compensation. While the thing to be done may be lawful in a general way, there are and must be limitations upon the means by which it is to be done."*

[61] Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675, 1 Smith's Cas. 391, 1 Cum. Cas. 431; Boughton v. Carter, 18 Johns. (N. Y.) 405; Fero v. Buffalo & State Line R. Co., 22 N. Y. 209, 78 Am. Dec. 178; Ireland v. Oswego, H. & S. Plank Road Co., 13 N. Y. 526; Pennsylvania & Ohio Canal Co. v. Graham, 63 Pa. St. 290, 3 Am. Rep. 549; Frankford & Bristol Turnpike Co. v. Philadelphia & Trenton R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Baltimore & Potomac R. Co. v. Reaney, 42 Md. 117; Delaware & Raritan Canal Co. v. Lee, 22 N. J. Law, 243.

* Columbus & Hocking Coal & Iron Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528.

The degree of care required depends, of course, upon the nature of the act, and must be in proportion to the danger.[62]

§ 243. Corporations charged with public trust or duty.

In an English case it was held, in effect, that a corporation which has a public trust or duty to discharge gratuitously is not liable, as a purely private corporation is, for the wrongful acts of its agents or servants, unless it is chargeable with negligence in selecting or retaining them.[63] But this decision has been limited, if not overruled, by later cases. In a leading case in the house of lords it was held that a public board charged with the duty of keeping certain docks in repair, and authorized to collect tolls and rates for such purpose, was liable for injury to a vessel due to neglect to keep the docks in proper repair, though the board had no private interest in the tolls and rates collected by it, but was merely bound to apply them for the purpose of keeping the docks in proper repair and order.[64] According to this and several other decisions in England, a corporation is liable for torts of its agents or servants, to the same extent as any private corporation, notwithstanding the fact that it is charged with a mere gratuitous trust or duty, provided it is in the receipt of funds out of which a judgment against it may be satisfied.[65]

§ 244. Corporations for the purpose of public charity.

Although there is authority to the contrary, the weight of authority is to the effect that a corporation created for the purpose of maintaining a public charity, the funds of which are derived from public and private donations for such purpose, and are held by it exclusively for such purpose, is not liable for the negligence or wrongful acts of its agents or servants, unless it has failed to use due care in employing or retaining them.

[62] Frankford & Bristol Turnpike Co. v. Philadelphia & Trenton R. Co., 54 Pa. St. 345, 93 Am. Dec. 708.

[63] Holliday v. Parish of St. Leonard, 11 C. B. (N. S.) 192.

[64] Mersey Docks v. Gibbs, 11 H. L. Cas. 686.

[65] Coe v. Wise, L. R. 1 Q. B. 711; Foreman v. Burgesses of Canterbury, L. R. 6 Q. B. 214.

This doctrine has been applied to corporations for the purpose of maintaining hospitals and similar institutions, in actions against them by patients or other persons receiving treatment or care, for injuries resulting from the negligence or wrongful act of a physician, nurse or other attendant.[66] But it is not limited to such corporations. It has been applied to other purely charitable corporations, as a corporation for the purpose of maintaining a house of refuge [67] or industrial school.[68] The doctrine was also applied in a Pennsylvania case to a fire insurance patrol corporation, organized for the purpose of protecting and saving property from fire.[69] There was a decision to the contrary, however, in Massachusetts, in the case of a corporation composed of officers and agents of fire insurance companies in Boston, organized for the purpose of preventing fires and saving life and property, the expenses of which were paid by compulsory assessments on fire insurance agents and organizations doing business in the city.[70]

To come within this doctrine, a corporation must be a purely charitable corporation.[71] Thus, it has been held that the rule

[66] McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Hearns v. Waterbury Hospital, 66 Conn. 98; Downes v. Harper Hospital, 101 Mich. 555, 45 Am. St. Rep. 427; Van Tassell v. Manhattan Eye & Ear Hospital, 60 Hun (N. Y.) 585; Joel v. Woman's Hospital, 89 Hun (N. Y.) 73; and cases cited infra, in this note, and in the notes following.

Compare, however, Glovin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

The doctrine has been applied to railroad companies and other large corporations maintaining a hospital for their employes, and this, although the hospital is sustained in part by contributions from employes. Union Pacific Ry. Co. v. Artist, 19 U. S. App. 612, 60 Fed. 365; Eighmy v. Union Pac. Ry. Co., 93 Iowa, 538; Richardson v. Carbon Hill Coal Co., 6 Wash. 52, 10 Wash. 648.

[67] Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495.

[68] Williamson v. Louisville Industrial School of Reform, 95 Ky. 251, 44 Am. St. Rep. 243.

[69] Fire Insurance Patrol v. Boyd, 120 Pa. St. 624, 6 Am. St. Rep. 745.

[70] Newcomb v. Boston Protective Dept., 151 Mass. 215. The corporation, said the court, was organized, not for the purpose of a public charity, but in the interest of the insurance companies and agencies, and for the purpose of diminishing the cost of insurance. Compare Fire Insurance Patrol v. Boyd, 120 Pa. St. 624, 6 Am. St. Rep. 745.

[71] Newcomb v. Boston Protective Dept., 151 Mass. 215, referred to above.

As to what are charitable corporations, see ante, §§ 30, 36(q).

does not apply to a cemetery corporation,[72] or to a Young Men's Christian Association.[73] According to some of the cases, a corporation for the purpose of maintaining a hospital or other public charity is none the less exempt from liability under this doctrine because of the fact that it receives pay from patients who are able to pay.[74]

Such a corporation is liable for the negligence or wrongful acts of its physicians, nurses, or other employes to the same extent as any other private corporation, if it has been guilty of negligence in employing or retaining them.[75]

II. Liability of Corporations under Statutes Imposing Penalties.

§ 245. In general.—Corporations are within a statute enjoining or prohibiting an act or omission, and imposing a penalty for violation thereof, to be recovered in a civil action, if they are within the intent and purpose of the statute, though they may not be expressly mentioned therein.

The liability of corporations to indictment will be considered in subsequent sections. This section relates to their liability under statutes, other than criminal statutes, imposing a penalty for doing or omitting to do acts prohibited or enjoined thereby, or, in other words, statutes imposing a penalty to be recovered in a civil action. There are some cases in which the courts, applying the general rule that penal statutes are to be strictly construed, have held that a corporation is not within a statute imposing a penalty, unless it applies to them in express terms, or unless an intention on the part of the legislature to include them is obvious upon the face of the statute. According to this view, it has been held that corporations were not included in a statute imposing a penalty upon "any person or

[72] Donnelly v. Boston Catholic Cemetery Ass'n, 146 Mass. 163.

[73] Chapin v. Holyoke Young Men's Christian Ass'n, 165 Mass. 280.

[74] McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Downes v. Harper Hospital, 101 Mich. 555, 45 Am. St. Rep. 427. Contra, Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

[75] Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675; and dicta in the other cases cited under this section.

persons" who should willfully, maliciously, or contrary to law, take, remove, or break down a canal or any works connected therewith, and providing that "such offender or offenders" should be also liable to indictment and fine;[76] or within a statute imposing a penalty upon "any person" who should take, carry away, or otherwise convert logs to his own use, without the consent of the owner, or alter or destroy any mark made thereon with intent to claim the same;[77] or within a statute imposing a penalty upon the "owner, agent, or superintendent of any manufacturing establishment" who should employ children under a certain age in more than a certain number of hours work per day.[78]

This view as to the construction of such statutes, however, is not supported by the weight of authority. The proper view is that such a statute is not to be strictly construed for the purpose of determining whether it applies to corporations, but that it is to be construed reasonably, and in accordance with what appears to have been the intention of the legislature, and that it is to be construed as applicable to corporations, though they may not be mentioned therein, or otherwise necessarily included therein, if they are within its purpose. It has therefore been held that a corporation is liable under a statute imposing a penalty upon "any person" who shall sell intoxicating liquors to a person in the habit of becoming intoxicated;[79] under a statute imposing a penalty upon any person who shall mark an

[76] Cumberland & Oxford Canal Corp. v. City of Portland, 56 Me. 77. See, also, State v. Cincinnati Fertilizer Co., 24 Ohio St. 611.

[77] Androscoggin Water Power Co. v. Bethel Steam-Mill Co., 64 Me. 441. This decision was very proper under the particular statute, for one of the sections thereof declared that any person who should do the acts specified in the statute should be deemed guilty of larceny. A corporation, as we shall see, cannot be guilty of a felony, and therefore the legislature could not have intended to include corporations.

[78] Benson v. Monson & Brimfield Mfg. Co., 9 Metc. (Mass.) 562. In this case it was said: "The provisions of acts imposing penalties are not to be extended by construction, beyond their obvious meaning and intent, as manifest upon the face of the statute. Corporations are not, in terms, included in the statute on which this action is brought."

[79] Stewart v. Waterloo Turn Verein, 71 Iowa, 226, 60 Am. Rep. 786.

unpatented article as patented;[80] and under many other statutes.[81] "Corporations," said the Iowa court, "are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute."[82]

While a statute imposing a penalty upon a corporation for wrongful acts or for negligence should be strictly construed in case of doubt, it must not be construed unreasonably, and so as to defeat its operation in many cases which are manifestly within the intention of the legislature.[83]

A penal action cannot be maintained against a corporation for acts of its agents not authorized or ratified by it, and not done by the agent in the course of his employment; but authority may be inferred from the circumstances.[84] A corporation may be liable to a penalty for an act of its agent, if done in the course of his employment, although contrary to instructions.[85]

III. Liability of Corporations to Indictment.

§ 246. In general.—A corporation is liable to indictment for a common-law or statutory crime, whether it consists of nonfeasance or misfeasance, provided it does not involve the element of personal violence or the element of malice or actual criminal intent, and

[80] Hotchkiss v. Samuel Cupples Wooden-Ware Co., 53 Fed. 1018.

[81] A manufacturing corporation is liable for the act of its superintendent in wrongfully affixing trade marks to the manufactured articles. Thompkins v. Butterfield, 25 Fed. 556. See, also, Pharmaceutical Soc. v. London & Provincial Supply Ass'n, 5 App. Cas. 857, where the question of the application of penal statutes to corporations is discussed.

[82] Stewart v. Waterloo Turn Verein, 71 Iowa, 226, 60 Am. Rep. 786.

[83] Western Union Tel. Co. v. Hamilton, 50 Ind. 181.

[84] Com. v. Ohio & Pennsylvania R. Co., 1 Grant's Cas. (Pa.) 329. See post, chapter XXIV.

In an action against a corporation to recover a penalty for illegally issuing notes, it is sufficient to show that the officer representing the corporation was an officer de facto. McGargell v. Hazleton Coal Co., 4 Watts & S. (Pa.) 424.

[85] St. Louis & San Francisco Ry. Co. v. Ryan, 56 Ark. 245, where it was held that a railroad ticket agent was acting within the scope of his authority in making an excessive charge of passenger fare, and that the company was liable for the statutory penalty therefor, although the agent acted contrary to orders. See, also, post, chapter XXIV.

provided the prescribed punishment may be imposed on a corporation. There is some authority for saying that it may be indicted for an offense involving the element of personal violence or malice, but this is doubtful. A corporation cannot be indicted for felony, because, if for no other reason, it cannot be imprisoned, and therefore cannot be subjected to punishment for felony.

Since a corporation is, in the language of Chief Justice Marshall, "an artificial being, invisible, intangible, and existing only in contemplation of law," it was formerly doubted whether a corporation could be indicted for any crime. Lord Holt is reported as having said that "a corporation is not indictable, but the particular members of it are."[86] This doctrine, however, if it has ever obtained, it is not now recognized in any jurisdiction. On the contrary, it is well settled that a corporation may to some extent be responsible for the criminal acts or omissions of its officers or agents, just as it may be civilly liable for their torts. In the nature of things, a corporation cannot be imprisoned, but it may be fined, and the fine may be enforced against its property, or its charter may be forfeited because of its misuser or abuse.[87]

[86] Anon., 12 Mod. 559, 1 Smith's Cas. 440.

[87] Reg. v. Birmingham & Gloucester Ry. Co., 3 Q. B. 223, 1 Smith's Cas. 440; Reg. v. Great North of England Ry. Co., 9 Q. B. 315, 1 Smith's Cas. 443; State v. Passaic County Agricultural Soc., 54 N. J. Law, 260, 1 Smith's Cas. 445; Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 201; and cases cited more specifically in the notes following.

In the absence of express statutory provision, a summons is the process to be issued to a corporation to appear and answer to an indictment, and it is served like other process is served on corporations. Boston, Concord & M. R. Co. v. State, 32 N. H. 215; State v. Western North Carolina R. Co., 89 N. C. 584. Compare People v. Equitable Gaslight Co., 6 N. Y. Crim. R. 189.

When a corporation has been duly summoned to appear and answer to an indictment, and fails to appear, a judgment by default may be rendered against it. Boston, Concord & M. R. Co. v. State, 32 N. H. 215; Com. v. Lehigh Valley R. Co., 165 Pa. St. 162.

Proceedings under a statute providing for bringing a corporation before an examining magistrate are not a condition precedent to the power of a grand jury to indict a corporation, but are only intended to provide a means for bringing the corporation before the examining magistrate, after presentment by grand jury, and are only necessary because a corporation cannot be arrested on bench warrant, as a natural person can; and a corporation may be indicted in the first instance as an individual may be indicted. State v. Security Bank of Clark, 2 S. D. 538.

§ 247. Offenses consisting of nonfeasance merely.

No principle of the criminal law or of the law of corporations is now better settled than the principle that a corporation may be indicted and fined for offenses consisting of mere nonfeasance, as where it neglects to perform duties which it owes to the public. For example, where a corporation is charged with the duty to keep in repair a public bridge or a turnpike or other public highway, for the benefit of the public, it may be indicted for a failure to do so, whereby a public nuisance is created.[88] A canal company is indictable for nuisance caused by failure to keep its canal in repair.[89] A corporation created for the purpose of constructing and maintaining a toll bridge, and required by its charter to keep the same at all times in good, safe, and passable repair, may be indicted for failure to light the same at night when necessary for the safety and convenience of the public.[90] And a railroad company may be indicted for disobeying an order by the proper authorities to construct arches or bridges to connect lands severed by the construction of its road, as required by its charter or by statute;[91] for failure to give signals or warnings at crossings of highways or other railroads, as required by statute for the safety of the public;[92] or for failure to repair highways where they are crossed

[88] Reg. v. Birmingham & Gloucester Ry. Co., 3 Q. B. 223, 1 Smith's Cas. 440; Com. v. Central Bridge Corp., 12 Cush. (Mass.) 242; State v. Godwinsville & Paterson Macadamized Road Co., 49 N. J. Law, 266, 60 Am. Rep. 611; State v. Morris Canal & Banking Co., 22 N. J. Law, 537; Susquehanna & Bath Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267; Syracuse & Tully Plank Road Co. v. People, 66 Barb. (N. Y.) 25; Waterford & Whitehall Turnpike v. People, 9 Barb. (N. Y.) 161; White's Creek Turnpike Co. v. State, 16 Lea (Tenn.) 24; Nashville & Duck River Ridge Turnpike Co. v. State, 96 Tenn. 249.

[89] Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570 (where it was held that a canal company was indictable for nuisance in maintaining its towpath in such a condition that water from its canal escaped through the locks or walls, and formed unwholesome pools of stagnant water, producing miasma, and corrupting the air, etc.); State v. Morris Canal & Banking Co., 22 N. J. Law, 537 (where an indictment was sustained against a canal company for failure to repair a bridge over the canal at a public highway).

[90] Com. v. Central Bridge Corp., 12 Cush. (Mass.) 242.

[91] Reg. v. Birmingham & Gloucester Ry. Co., 3 Q. B. 223, 1 Smith's Cas. 440.

[92] Louisville & Nashville R. Co.

by its line, or to perform any other duty which is imposed upon it by law, and the nonperformance of which constitutes a public nuisance.[93]

The general rule is that an indictment will lie against a corporation for failure to perform any duty imposed upon it for the benefit of the public, where its neglect results in injury to the public.[94]

A city is liable to indictment for nuisance, if, having the power to direct the excavation, deepening, or cleansing of a basin connected with a river, it neglects to take the necessary measures to that end after the basin has become foul and unwholesome by reason of the accumulation of mud and filth.[95]

The fact that a corporation is without funds, and is therefore unable to perform duties imposed upon it for the benefit of the public, is no defense when it is indicted for a nuisance resulting from its neglect.[96]

§ 248. Offenses consisting of malfeasance or misfeasance.

In several of the earlier cases a distinction was made, with respect to the criminal responsibility of corporations, between nonfeasance, as in the cases mentioned in the preceding section, and malfeasance or misfeasance, and, while it was conceded that an indictment would lie against a corporation for nonfeasance, it was held that it would not lie for malfeasance or mis-

v. Com., 13 Bush. (Ky.) 388, 26 Am. Rep. 205.

[93] See State v. Concord R. Co., 59 N. H. 85; Texas & St. Louis R. Co. v. State, 41 Ark. 488; New York & Greenwood Lake R. Co. v. State, 50 N. J. Law, 303, 53 N. J. Law, 244; Louisville & Nashville R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; Memphis, Prospect Park & B. R. Co. v. State, 87 Tenn. 746; State v. Monongahela River R. Co., 37 W. Va. 108; Pittsburgh, Virginia & C. Ry. Co. v. Com., 101 Pa. St. 192. For other cases of indictment for nonfeasance, see New York & Greenwood Lake R. Co. v. State, 50 N. J. Law, 303, 53 N. J. Law, 244; Nashville & Duck River Ridge Turnpike Co. v. State, 96 Tenn. 249.

[94] Com. v. Hancock Free Bridge Corp., 2 Gray (Mass.) 58. And see the other cases above cited. In a criminal prosecution against a corporation for failure to do acts enjoined on it by its charter the corporation may show that it has performed the acts in question since the bringing of the indictment. State v. Godwinsville & Paterson Macadamized R. Co., 44 N. J. Law, 496.

[95] People v. City of Albany, 11 Wend. (N. Y.) 539.

[96] Waterford & Whitehall Turnpike v. People, 9 Barb. (N. Y.) 174.

feasance, as for a nuisance created by erecting a dam across a navigable river,[97] or by digging up a highway and placing stones and dirt therein.[98]

These cases, however, have not been followed. On the contrary, it is now settled, both in England and in this country, that a corporation, except as will be explained in a subsequent section, may be indicted for malfeasance or misfeasance, as well as for nonfeasance.[99]

Thus, it has repeatedly been held that an indictment will lie against a railroad company, or other corporation, for a nuisance in obstructing a public highway by cutting through the same, stopping cars thereon, building stations or other structures thereon, or other positive acts;[100] for nuisance in obstructing a navigable river by building a bridge or dam across the same;[101] for polluting a watercourse by casting offensive matter therein,[102] or other nuisances by misfeasance;[103] for permitting gaming on its premises;[104] for keeping a disorderly

[97] State v. Great Works Milling & Mfg. Co., 20 Me. 41, 37 Am. Dec. 38.

[98] Com. v. Swift Run Gap Turnpike Co., 2 Va. Cas. 362. See, also, State v. Ohio & Mississippi R. Co., 23 Ind. 362.

[99] Reg. v. Great North of England Ry. Co., 9 Q. B. 315, 1 Smith's Cas. 443; State v. Passaic County Agricultural Soc., 54 N. J. Law, 260, 1 Smith's Cas. 445; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; Palatka & Indian River R. Co. v. State, 23 Fla. 546, 11 Am. St. Rep. 395; Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663; State v. Baltimore & Ohio R. Co., 15 W. Va. 362, 36 Am. Rep. 803; Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 197; and cases more specifically cited in the notes following.

[100] Reg. v. Great North of England Ry. Co., 9 Q. B. 315, 1 Smith's Cas. 443; State v. Morris & Essex R. Co., 23 N. J. Law, 360; State v. Western North Carolina R. Co., 95 N. C. 602; State v. Vermont Cent. R. Co., 27 Vt. 103; Com. v. Vermont & Massachusetts R. Co., 4 Gray (Mass.) 22; Cincinnati R. Co. v. Com., 80 Ky. 137; Northern Cent. Ry. Co. v. Com., 90 Pa. St. 300.

[101] Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339.

[102] Rex v. Medley, 6 Car. & P. 292; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586.

In Rex v. Medley, 6 Car. & P. 292, an indictment was sustained against a gas company for nuisance in so conducting its works as to convey large quantities of noisome liquids into the River Thames, and thereby polluting the water, and destroying fish.

[103] People v. Detroit White Lead Works, 82 Mich. 471.

[104] Com. v. Pulaski County Agri-

house,[105] for cutting down timber and thereby obstructing a river, in violation of a statute;[106] for violation of a statute punishing usury;[107] for violation of the Sunday laws;[108] for publishing a libel;[109] for issuing papers which the law requires to be stamped, without the proper stamps, with intent to evade the revenue law;[110] for violation of a statute punishing contractors for exacting from laborers more than eight hours' labor per day on public work;[111] for peddling by an agent without a license;[112] and for a criminal contempt of court in publishing an article concerning a pending trial.[113]

In a leading Massachusetts case it was said: "Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offenses against the person. But beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation, impossible; because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way to the special injury and damage of an in-

cultural & Mechanical Ass'n, 92 Ky. 197. Compare State v. Sullivan County Agricultural Soc., 14 Ind. App. 369.

[105] State v. Passaic County Agricultural Soc., 54 N. J. Law, 260, 1 Smith's Cas. 445.

[106] State v. White Oak River Corp., 111 N. C. 661.

[107] State v. Security Bank of Clark, 2 S. D. 538.

[108] State v. Baltimore & Ohio R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

[109] State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663. And see Telegram Newspaper Co. v. Com., 172 Mass. 274.

[110] United States v. Baltimore & Ohio R. Co., 7 Am. Law Reg. (N. S.) 757, Fed. Cas. No. 14,509.

[111] United States v. John Kelso Co., 86 Fed. 304.

[112] Standard Oil Co. v. Com. (Ky.) 55 S. W. 8.

[113] Telegram Newspaper Co. v. Com., 172 Mass. 274. See post, § 257.

dividual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses."[114]

In some states statutes have been enacted expressly providing for indictments against corporations for nuisance, whether caused by nonfeasance or by misfeasance.[115]

§ 249. Offenses involving malice or evil intent.

It has been said that a corporation cannot be guilty of an offense which involves the element of malice or evil intent,[116] but the extent to which this is true is by no means clear. It

[114] Per Judge Bigelow, in Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339.

In a leading English case it was said by Lord Denman: "The question is, whether an indictment will lie at common law against a corporation for a misfeasance, it being admitted, in conformity with undisputed decisions, that an indictment may be maintained against a corporation for nonfeasance. All the preliminary difficulties, as to the service and execution of process, the mode of appearing and pleading, and enforcing judgment, are by this admission swept away. But the argument is, that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming, in the first place, that there is a plain and obvious distinction between the two species of offense. No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards. If A. is authorized to make a bridge with parapets, but makes it without them, does the offense consist in the construction of the unsecured bridge, or in the neglect to secure it? But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offense and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the nonrepair of it; and they may as well be compelled to pay a fine for the act as for the omission." Reg. v. Great North of England Ry. Co., 9 Q. B. 315, 1 Smith's Cas. 443.

[115] See State v. Louisville, New Albany & C. Ry. Co., 86 Ind. 114; State v. Baltimore, Ohio & C. R. Co., 120 Ind. 298.

[116] Reg. v. Great North of England Ry. Co., 9 Q. B. 315, 1 Smith's Cas. 443; Reg. v. Birmingham & Gloucester Ry. Co., 3 Q. B. 223, 1 Smith's Cas. 440; Com. v. Proprietors of New Bedford Bridge, 2

is well settled that a corporation may be held liable in a civil action for wrongs of its officers and agents involving the element of malice, and that it may be subjected to exemplary or punitive damages, and the assertion that they cannot be indicted for any offenses which derive their criminality from evil intent may well be questioned.[117] Indeed, the tendency of the late cases is to the effect that they may be indicted for offenses involving the element of malice or a specific intent.

Malice is an element of criminal libel, and in a Tennessee case an indictment against a corporation for libel was sustained.[118] And in a late Massachusetts case it was held that a corporation is indictable for a criminal contempt of court (publishing an article in a newspaper concerning a pending trial, which is calculated to prejudice the jury and prevent a fair trial), although a criminal contempt involves a specific intent as a necessary element.[118a]

Dr. Wharton says in his work on Crimes that there is no reason why the same acts for which a corporation is subject to a civil action may not equally be the basis of a criminal proceeding, when either result in injury to the public at large.[119] And in a late Kentucky case it was said: "There are crimes of which, from their very nature, as perjury for example, they (corporations) cannot be guilty. There are crimes to the punishment for which, for a like reason, they cannot be subjected, as in the case of felony; but wherever the offense consists in

Gray (Mass.) 339; Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570.

[117] State v. Passaic County Agricultural Soc., 54 N. J. Law, 260, 1 Smith's Cas. 445.

[118] State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663.

"The very basis of the action for libel or for malicious prosecution is the evil intent, the malice, of the party defendant. It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance [see ante, § 238(c)], and mulcted in exemplary damages [see ante, § 239], and at the same time not be indictable for like offenses, where the injury falls upon the public." State v. Passaic County Agricultural Soc., 54 N. J. Law, 260.

[118a] Telegram Newspaper Co. v. Com., 172 Mass. 274.

[119] 1 Wharton, Crim. Law, § 87. See, also, State v. Passaic County Agricultural Soc., 54 N. J. Law, 260, 1 Smith's Cas. 445; Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 200; State v. Baltimore & Ohio R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

either a misfeasance or a nonfeasance of duty to the public, and the corporation can be reached for punishment as by a fine and seizure of its property, precedent authorizes and public policy requires that it should be liable to indictment."[120]

It must be regarded as settled, however, that a corporation cannot be guilty of treason, of felony, or of perjury.[121]

§ 250. Offenses involving personal violence.

It has also been said that a corporation cannot be guilty of an offense involving the element of personal violence, as assault and battery, riots, etc.;[122] and there seems to be no reported case in which an indictment for such an offense has been maintained against a corporation. As we have seen, however, a corporation may be held liable in a civil action for an assault and battery committed by its officers or agents, and subjected to exemplary damages, and there is no good reason why it may not be indicted and fined for such an offense.[123]

§ 251. Inapplicability of penalty.

Even if it be conceded that a corporation has the capacity to commit a particular crime, it cannot be indicted therefor if the punishment prescribed for the crime cannot be imposed upon a corporation. A corporation, therefore, could not be indicted for a felony, because, if for no other reason, the punishment for felony is death or imprisonment, to neither of which penalties a corporation can be subjected.

[120] Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 200.

[121] Reg. v. Great North of England Ry. Co., 9 Q. B. 315, 1 Smith's Cas. 443; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570; Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 200.

[122] Reg. v. Birmingham & Gloucester Ry. Co., 3 Q. B. 223, 1 Smith's Cas. 440; Reg. v. Great North of England Ry. Co., 9 Q. B. 315, 1 Smith's Cas. 443; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570. It was so held in Com. v. Punxsutawney St. Passenger R. Co., 24 Pa. Co. Ct. Rep. 25.

[123] 1 Wharton, Crim. Law, § 87; Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 200; State v. Baltimore & Ohio R. Co., 15 W. Va. 360, 36 Am. Rep. 803.

If the penalty prescribed for an offense is both fine and imprisonment, the statute cannot be applied to corporations in so far as regards the imprisonment, but the inability to punish by imprisonment does not prevent an indictment against a corporation and its punishment by fine.[124]

§ 252. Statutory offenses.

In all jurisdictions there are statutes expressly punishing various acts or omissions of corporations, but to treat of these is not within the scope of this work. It is often difficult to determine whether corporations are within statutes punishing acts, without expressly mentioning corporations.

In an Ohio case the court applied the general rule that criminal laws are to be construed strictly in favor of the accused, and held that a corporation was not a person, within the meaning of a statute punishing persons who should create or maintain public nuisances.[125] In other states, however, it has been held that a statute punishing certain acts when committed by "any person" applies to corporations as well as natural persons, if they are within its intent and purpose. Thus, it has been held that a bank may be indicted for usury under a statute declaring "every person" who shall receive usury guilty of a misdemeanor;[126] that a railroad company running its cars on Sunday may be indicted under a statute declaring that, if "a person" shall be found laboring at any trade or calling on Sunday, "he" shall be fined;[127] and that a corporation may be indicted under a revenue law punishing the issue of papers without proper stamps, with intent to evade

[124] Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 197, 201.

[125] State v. Cincinnati Fertilizer Co., 24 Ohio St. 611. In this case, however, the court was also influenced by the fact that the statutes of Ohio were adapted only to the prosecution and punishment of natural persons. See, also, State v. Ohio & Mississippi R. Co., 23 Ind. 362.

[126] State v. Security Bank of Clark, 2 S. D. 538.

[127] State v. Baltimore & Ohio R. Co., 15 W. Va. 362, 36 Am. Rep. 803. See, also, St. Louis, Arkansas & Texas Ry. Co. v. State, 52 Ark. 51.

the law,[128] and under a statute punishing contractors for exacting more than eight hours' labor from laborers on public work.[129]

§ 253. Particular penalty imposed by statute.

When the charter of a corporation or some other statute imposes a duty for the benefit of the public, and prescribes a particular penalty for its failure to perform the same, such penalty is cumulative, and does not prevent an indictment at common law, or under a general statute, unless it affirmatively appears, from negative words or otherwise, that the prescribed penalty was intended to be exclusive.[130]

Thus, it has been held that a turnpike company may be indicted for failure to keep its road in repair, notwithstanding a provision in its charter imposing a fine for failure to repair, to be recovered upon an information before a justice of the peace, upon the person intrusted with the repair of the road, one-half of the fine to go to the prosecutor and the other to the county;[131] and that an indictment will lie against a railroad company for building an embankment across a public highway and neglecting to keep the same in good repair, under a statute making it a misdemeanor, punishable by indictment, for any person to obstruct a highway, notwithstanding a subsequent statute providing for a civil proceeding to recover a penalty against railroad companies for failure to construct highway crossings and keep them in repair.[132]

§ 254. Unauthorized acts of agents.

While a corporation is not responsible or indictable for the

[128] United States v. Baltimore & Ohio R. Co., 7 Am. Law Reg. (N. S.) 757, Fed. Cas. No. 14,509.

[129] United States v. John Kelso Co., 86 Fed. 304.

[130] White's Creek Turnpike Co. v. State, 16 Lea (Tenn.) 24; St. Louis, Arkansas & Texas Ry. Co. v. State, 52 Ark. 51; Syracuse & Tully Plank-Road Co. v. People, 66 Barb. (N. Y.) 25; Waterford & Whitehall Turnpike v. People, 9 Barb. (N. Y.) 161; Susquehannah & Bath Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267.

[131] White's Creek Turnpike Co. v. State, 16 Lea (Tenn.) 24.

[132] St. Louis, Arkansas & Texas Ry. Co. v. State, 52 Ark. 51.

acts of its agents in excess of their authority and not in the course of their employment, an indictment may be maintained against a corporation for an act of its agent done in the course of his employment, without showing that the act was expressly authorized, and even though it may have been contrary to instructions.

It was so held in a late Tennessee case, in which a railroad company was indicted for obstructing a public highway by permitting a train to remain standing across the same for an unreasonable time, and a conviction was sustained, notwithstanding rules and regulations forbidding its employes to permit such an obstruction. "Being a corporation," said the court, it necessarily acts only through its agents. If the obstruction is the act of its agent, it is the act of the corporation; provided the agent did the act in the course and scope of his duty as agent. It is immaterial that the agent was by the rules of the company, instructed not to permit such obstruction to continue for a time deemed by the corporation to be unreasonable. If such agent disobeys the reasonable requirement of the corporation, it becomes liable for the nuisance, because the agent was within the scope of his duty in operating the train and in stopping it across a public road. This principle is necessary to be enforced in regard to acts of misfeasance by corporations of this character. Otherwise, the public would be required to look alone to subordinates in general unknown and irresponsible."[133]

§ 255. Corporation in hands of receiver.

If a corporation is in the hands of a receiver, who has full possession of its property and entire charge of its affairs, the agents employed in the transaction of its business are the agents of the receiver, and not the agents of the corporation, and the

[133] State v. Louisville & Nashville R. Co., 91 Tenn. 445. See, also, Rex v. Medley, 6 Car. & P. 292 (where directors of a gas company were held indictable for a nuisance caused by the act of their superintendent and engineer); Com. v. Ohio & Pennsylvania R. Co., 1 Grant's Cas. (Pa.) 329 (which was an action to recover a penalty).

corporation, having no control over them, is not criminally responsible for their acts. Thus, a railroad company, while it is under the sole management of a receiver, is not indictable for a nuisance caused by the obstruction of a public highway by the stopping of trains therein.[134]

§ 256. Effect of legislative authority.

What has been said in treating of the liability of a corporation for torts, with respect to the effect of charter or statutory authority,[135] applies also when a corporation is indicted for an act as constituting a crime. An act which is strictly within the powers conferred upon a corporation by its charter, if the grant of power is constitutional, cannot be made the basis of a criminal prosecution against the corporation, even though it would constitute a nuisance or other offense if done by an individual, or if done by a corporation without legislative authority.[136] For example, a railroad company is not indictable for nuisance in operating its railroad near a public highway, and thereby frightening the horses of persons traveling along the highway, if it is acting within the powers conferred by its charter.[137] The same is true of a street railroad company constructing and operating a railroad in the streets of a city as authorized by its charter.[138]

In determining, however, whether the charter of a corporation authorizes it to do an act which, if unauthorized, would constitute a public nuisance, the charter should be strictly construed. An indictment against a corporation for nuisance cannot be defeated on the ground that the act is authorized by its charter, if the powers conferred by the charter can be exercised

[134] State v. Vermont Cent. R. Co., 30 Vt. 108. And see State v. Wabash Ry. Co., 115 Ind. 466.

[135] Ante, § 242.

[136] Rex v. Pease, 4 Barn. & Adol. 30, 1 Nev. & M. 690; State v. Louisville, New Albany & C. Ry. Co., 86 Ind. 114; Danville, Hazleton & W. R. Co. v. Com., 73 Pa. St. 29; Pittsburgh & Allegheny Bridge Co. v. Com. (Pa. St.) 8 Atl. 217; People v. Law, 34 Barb. (N. Y.) 502; State v. Portland & Kennebec R. Co., 57 Me. 402.

[137] Rex v. Pease, 4 Barn. & Adol. 30, 1 Nev. & M. 690.

[138] State v. Louisville, New Albany & C. Ry. Co., 86 Ind. 114.

without creating a nuisance.[139] For example, a corporation cannot conduct a lottery for the purpose of selling property, in violation of a general law making the conducting of a lottery a misdemeanor, under authority conferred by its charter to sell and dispose of property placed in its hands for sale, "in any mode or manner the corporation shall deem best."[140]

It is also necessary, in order that the charter of a corporation may justify an act which, if unauthorized, constitutes an offense, that the corporation shall have kept strictly within the powers conferred by its charter, and that it shall have acted with due care to do as little injury as possible.[141] Thus, a corporation authorized to maintain a bridge over a public highway, and to occupy a part of the same with piers, abutments, etc., is indictable for nuisance if it uses a part of the highway for the storage of lumber or other materials for making repairs when needed.[142] And a railroad company, bridge company, or other corporation for the purpose of constructing a work of public utility is liable to indictment for nuisance if it intentionally or negligently constructs its works in such a way as to cause unnecessary injury or inconvenience to the public.[143]

[139] State v. Krebs, 64 N. C. 604; Reg. v. Great North of England Ry. Co., 9 Q. B. 315; State v. Inhabitants of Freeport, 43 Me. 198; Pittsburgh & Allegheny Bridge Co. v. Com. (Pa. St.) 8 Atl. 217; State v. Chicago, Milwaukee & St. P. Ry. Co., 77 Iowa, 442.

[140] State v. Krebs, 64 N. C. 604.

[141] Reg. v. Great North of England Ry. Co., 9 Q. B. 315; Pittsburgh & Allegheny Bridge Co. v. Com. (Pa. St.) 8 Atl. 217; State v. Monongahela River R. Co., 37 W. Va. 108; Louisville & Nashville R. Co. v. Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205; State v. Inhabitants of Freeport, 43 Me. 198; Com. v. Proprietors of Newburyport Bridge, 9 Pick. (Mass.) 142; Louisville & Nashville R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; Memphis, Prospect Park & B. R. Co. v. State, 87 Tenn. 746.

[142] Pittsburgh & Allegheny Bridge Co. v. Com. (Pa. St.) 8 Atl. 217.

[143] Louisville & Nashville R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; State v. Inhabitants of Freeport, 43 Me. 198; State v. Louisville, New Albany & C. Ry. Co., 86 Ind. 114; Northern Cent. Ry. Co. v. Com., 90 Pa. St. 300. And see the cases in note 141, supra.

Where the charter of a railroad or bridge company authorizes it to erect a bridge across tide waters, provided it does not "prevent" the navigation thereof, it is not liable to indictment for erecting a bridge which merely impedes navigation to some extent. State v. Portland & Kennebec R. Co., 57 Me. 402.

IV. LIABILITY FOR CONTEMPT OF COURT.

§ 257. In general.—A corporation may be guilty of a contempt of court, and punished therefor by fine.

Because of the fact that a corporation is impersonal, and cannot be attached,—that is, personally seized or taken,—it was at one time considered that a corporation could not be punished for contempt of court in disobeying or violating an injunction or their order or decree,[144] and this view is supported by *dicta* in a few late cases.[145] The overwhelming weight of authority, however, is against this doctrine. To punish one for contempt of court, attachment or seizure of the person is not necessary. The punishment may be by imposition of a fine. A corporation may be fined, just as a natural person may be, not only for a misdemeanor, for which, as we have just seen, a corporation may be liable to indictment, but also for contempt; and the fine may be collected by sequestration of its property, or any other appropriate remedy that may be provided by statute. It is now well settled in most jurisdictions, therefore, that a corporation may be guilty of a contempt of court to the same extent and under the same circumstances as a natural person, and may be punished therefor by a fine, and the remedy is not, as was formerly thought, against its officers only.[146]

The liability of a corporation to punishment for contempt of

[144] See Mills' Case, T. Raym. 152; First Congregational Church of Bloomington v. City of Muscatine, 2 Iowa, 69.

[145] Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147.

[146] Golden Gate Consolidated Hydraulic Min. Co. v. Yuba County Superior Court, 65 Cal. 187; People v. Albany & Vermont R. Co., 20 How. Pr. (N. Y.) 358, 12 Abb. Pr. 171; City of New York v. New York & Staten Island Ferry Co., 64 N. Y. 622; In re Western Marine & Fire Ins. Co., 38 Ill. 289; West Jersey Traction Co. v. Camden Board of Public Works, 58 N. J. Law, 536; United States v. Memphis & Little Rock R. Co., 6 Fed. 237; Indianapolis Water Co. v. American Strawboard Co., 75 Fed. 972; First Congregational Church of Bloomington v. City of Muscatine, 2 Iowa, 69.

In Re Western Marine & Fire Ins. Co., 38 Ill. 289, a corporation which was a depositary of funds of a court was held punishable for contempt in failing to pay over funds on an order of the court. Compare Southern Development Co. v. Houston & Texas Cent. Ry. Co., 27 Fed. 344.

court is not limited to civil contempts. As we have seen, a corporation may be indicted for some offenses involving the element of malice or evil intent, and it may therefore be indicted for a criminal contempt of court, although the offense involves specific intent as a necessary element. It was so decided in a late Massachusetts case, in which a corporation engaged in the publication of a newspaper was indicted for contempt of court in publishing an article concerning a pending trial, which was calculated to prejudice the jury and prevent a fair trial.[147]

[147] Telegram Newspaper Co. v. Com., 172 Mass. 274.

CHAPTER XIV.

ACTIONS BY AND AGAINST CORPORATIONS.

§ 258. In general.
259. Actions at law.
260. Suits in equity.
261. Libels in admiralty.
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263. Statutory conditions precedent to suit.
264. Confession of judgment, compromise, and arbitration.
265. Quo warranto, scire facias, and mandamus.
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267. Process, service, and appearance.

§ 258. In general.—In the absence of charter or statutory provisions to the contrary, a corporation has the same capacity as a natural person to sue and be sued, either at common law, or in equity, or in admiralty. And it is entitled to the benefit of, and is subject to, special statutory remedies, though not expressly mentioned in the statute, if it is within the reason and purpose of the statute.

A corporation may confess judgment, compromise an action by or against it, or submit a matter in dispute to arbitration.

Among the incidental or implied powers which have been attributed to corporations from the earliest period is the power to sue and be sued. This power need never be expressly conferred. Whenever a corporation is duly created, among the incidents "*tacite* annexed" is the capacity "to sue and be sued, implead and be impleaded."[1] Corporations, therefore, unless

[1] Sutton's Hospital Case, 10 Coke, 23a, 2 Cum. Cas. 14; 1 Kyd, Corp. 185; Conservators of River Tone v. Ash, 10 Barn. & C. 349, 1 Cum. Cas. 23; Proprietors of White School House v. Post, 31 Conn. 240; Town of Stratford v. Sanford, 9 Conn. 275; Estell v. Knightstown & Middletown Turnpike Co., 41 Ind. 174; Dental Vulcanite Co. v. Wetherbee, 2 Cliff. 555, Fed. Cas. No. 3,810; Town of Jonesboro v. McKee, 2 Yerg. (Tenn.) 167; Marsh v. Astoria Lodge, No. 112, I. O. O. F., 27

there is some restriction in their charter, "may maintain all such actions as are necessary to assert their rights when invaded, or to give them a recompense for any injury that can be done to them;" and, *e converso,* they may be sued like a natural person, to enforce any obligation to which they may be subject, or to obtain redress for any wrong for which they are liable.[2]

Corporations in which the state has an interest.—Although a state or the United States cannot be sued without its consent, this doctrine does not prevent a suit against a corporation in which the state is a stockholder or has an interest. It has been held that the fact that a state is the sole proprietor of a corporation does not prevent the corporation from being sued.[3] And *a fortiori* a corporation is not exempt from suit merely because a state is a stockholder, or is otherwise partly interested therein.[4] Where a state owning a canal transferred it to a corporation created by itself, and retained an interest therein, it was held that it thereby divested itself of its sovereignty as to the corporation, and that the corporation might be sued for mismanagement of the canal.[5]

Dissolution or insolvency.—As we shall see in another place, a corporation cannot maintain an action after it has been dissolved, unless there is some statutory provision continuing its existence for this purpose. But the power to sue is not affected by the fact of its insolvency, where there has been no dissolution.[6] The same is true of actions against corporations. An action will not lie against a corporation after its dissolution

Ill. 420; McKim v. Odom, 3 Bland (Md.) 407; Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Clarissy v. Metropolitan Fire Dept., 7 Abb. Pr. (N. S.; N. Y.) 352.

[2] 1 Kyd, Corp. 185.

It was held in an Illinois case that a corporation cannot sue in its own name when its charter requires suits to be brought by the trustees or other officers. Marsh v. Astoria Lodge, No. 112, I. O. O. F., 27 Ill. 420; post, § 266.

[3] Bank of United States v. Planters' Bank of Georgia, 9 Wheat. (U. S.) 904; Bank of Kentucky v. Wister, 2 Pet. (U. S.) 318; Briscoe v. Bank of Kentucky, 11 Pet. (U. S.) 257; Western & Atlantic R. Co. v. Taylor, 6 Heisk. (Tenn.) 408; Hutchinson v. Western & Atlantic R. Co., 6 Heisk. (Tenn.) 634.

[4] Moore v. Wabash & Erie Canal, 7 Ind. 462.

[5] Moore v. Wabash & Erie Canal, 7 Ind. 462.

[6] Post, §§ 311, 329.

in the absence of statutory provision therefor, but the insolvency of a corporation, where there has been no dissolution, will not prevent an action against it, unless the action is prohibited by statute, as is sometimes the case.[7]

Action between a corporation and its stockholders or members.—The rule that a person cannot sue himself does not apply as between a corporation and its stockholders or members, for they are distinct persons in the law.[8] A corporation, therefore, may sue its stockholders or members, and may be sued by them. For example, a corporation may sue a stockholder on his subscription to its capital stock,[9] and a stockholder may sue the corporation for his share of a dividend declared upon its capital stock.[10] The same is true of other causes of action, whether arising *ex contractu* or *ex delicto.*

§ 259. Actions at law.

(a) In general.—The implied or incidental power of a corporation to sue gives a corporation the right, to the same extent as a natural person, to maintain an action of *assumpsit* to recover damages for breach of an express or implied simple contract, or an action of covenant to recover damages for breach of a contract under seal, or an action of debt to recover a debt due to it.[11] It may sue *in assumpsit* to recover for use and occupation of land.[12]

A corporation may also maintain actions *ex delicto* to recover damages for wrongs, as trespass, trespass on the case, and trover.[13] And in order to recover property, real or personal, it

[7] Post, §§ 311, 329.

[8] Ante, § 6(e); post, § 535.

[9] Post, § 492.

[10] Post, § 527.

[11] 1 Kyd, Corp. 187, 191; Burgesses of Stafford v. Till, 4 Bing. 75.

[12] Burgesses of Stafford v. Till, 4 Bing. 75.

[13] 1 Kyd, Corp. 187; Conservators of River Tone v. Ash, 10 Barn. & C. 349, 1 Cum. Cas. 23; Mather v. Ministers of Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663; Tilden v. Metcalf, 2 Day (Conn.) 259; Town of Stratford v. Sanford, 9 Conn. 275; Greenville & Columbia R. Co. v. Partlow, 14 Rich. Law (S. C.) 237.

A corporation may be libeled, and it may maintain an action on the case to recover damages. Metropolitan Saloon Omnibus Co. v. Hawkins, 4 Hurl. & N. 146; Trenton Mutual Life & Fire Ins. Co. v. Perrine, 23 N. J. Law, 402, 57 Am. Dec. 400; Shoe & Leather Bank v.

may, in proper cases, maintain ejectment, writ of entry, or replevin.[14]

In like manner, the creation of a corporation vests it with the capacity to be sued like a natural person.[15] Any of the various common-law actions may be maintained against a corporation, whether the action be *ex contractu,* as in the case of debt, covenant, and *assumpsit* on an express or implied simple contract,[16] or *ex delicto,* as in the case of trespass,[17] trover,[18] and action on the case,[19] or to recover specific real or personal property, as in the case of ejectment and replevin.[20]

(b) Effect of statutory remedy.—A corporation may maintain an action at common law to enforce a common-law right or recover damages for its infringement, notwithstanding the fact that its charter gives it a special remedy, provided the remedy existing at common law is not expressly excluded; but where a right is given by the charter of a corporation, and not by the

Thompson, 23 How. Pr. (N. Y.) 253; Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87, 95 Am. Dec. 519; Knickerbocker Life Ins. Co. v. Ecclesine, 42 How. Pr. (N. Y.) 201, 34 N. Y. Super. Ct. 76.

[14] 1 Kyd, Corp. 185, 187; Chedington's Case, 1 Coke, 153; Society for Propagation of the Gospel v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13,156.

[15] Sutton's Hospital Case, 10 Coke, 23a, 2 Cum. Cas. 14; 1 Kyd, Corp. 185; McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689; and cases following.

[16] Bank of Columbia v. Patterson's Adm'r, 7 Cranch (U. S.) 299, 1 Smith's Cas. 213, 1 Keener's Cas. 496, 1 Cum. Cas. 112; Dunningtons v. Northwestern Turnpike Road, 6 Grat. (Va.) 160. See ante, § 192.

As we have seen in another place, it was formerly thought that a corporation must contract under the corporate seal, and, if this were the case, assumpsit, which will only lie on a contract not under seal, could not be maintained against it. It is now well settled, however, that a corporation may enter into a simple contract and may be liable on an implied contract. See, ante, § 192.

[17] Maund v. Monmouthshire Canal Co., 4 Man. & G. 452, 1 Smith's Cas. 389, 1 Keener's Cas. 823, 1 Cum. Cas. 429; Hazen v. Boston & Maine Railroad, 2 Gray (Mass.) 574; Crawfordsville & Wabash R. Co. v. Wright, 5 Ind. 252; McCready v. Guardians of the Poor, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667; White v. City Council of Charleston, 2 Hill (S. C.) 571; Main v. Northeastern R. Co., 12 Rich. Law (S. C.) 82, 75 Am. Dec. 725; ante, § 237(c).

[18] Yarborough v. Bank of England, 16 East, 6, 1 Smith's Cas. 386, 1 Cum. Cas. 426; ante, § 237(c).

[19] Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675, 1 Smith's Cas. 391, 1 Cum. Cas. 431; Riddle v. Proprietors of Locks and Canals on Merrimack River, 7 Mass. 169; ante, §§ 237(c), 238.

[20] Dater v. Troy Turnpike & R. Co., 2 Hill (N. Y.) 629.

common law, and the charter gives a special remedy for its enforcement, an action at common law will not lie, for the rule is that every duty created by a statute must be enforced specifically by the means, where there are any, provided in the statute itself.[21] In accordance with these rules it was held in Pennsylvania that where the charter of a turnpike company gave it the right to collect tolls, and provided a special remedy for enforcing the right so given, the company could maintain an action of *assumpsit* at common law on a *special contract* for the use of its road, instead of resorting to the special remedy,[22] but that it could not maintain *assumpsit* on the theory of an implied contract to pay tolls.[23]

The same rule applies to remedies against corporations. If the charter of a corporation or some other statute provides a remedy for failure of the corporation to perform a duty existing at common law, such remedy is not exclusive of the common-law remedy unless it is expressly made so by the statute, and an action at common law will lie against the corporation for failure to perform the duty. Where a "statute creates a special duty, for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided. The latter is only cumulative."[24] Thus, an action at common law will lie against a railroad company for negligently running over and killing stock on its track, notwithstanding the fact that a statute expressly requires railroad companies to fence their roads, and imposes a liability for failure to do so.[25]

[21] Per Gibson, C. J., in Huntington, C. & I. Turnpike Road Co. v. Brown, 2 Pen. & W. (Pa.) 462.

[22] Dorman v. Pittsburgh & Steubenville Turnpike Road Co., 3 Watts (Pa.) 126; Beeler v. Pittsburgh F. & M. Turnpike Road Co., 14 Pa. St. 162.

[23] Huntington, C. & I. Turnpike Road Co. v. Brown, 2 Pen. & W. (Pa.) 462; Chestnut Hill Turnpike Co. v. Martin, 12 Pa. St. 361.

[24] Iba v. Hannibal & St. Joseph R. Co., 45 Mo. 469.

[25] Iba v. Hannibal & St. Joseph R. Co., 45 Mo. 469. For other cases in which this rule has been applied or recognized, see Norris v. Androscoggin R. Co., 39 Me. 273, 63 Am. Dec. 621; Chittenden v. Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462.

On the other hand, if the charter of a corporation or some other statute imposes a duty upon the corporation not existing at common law, and provides a special remedy for failure to perform the same, an action at common law will not lie to recover damages for nonperformance, but the special remedy is exclusive.[26]

§ 260. Suits in equity.

Corporations, to the same extent as natural persons, may maintain suits in equity to protect or enforce their rights. Thus, they may sue to enjoin a trespass upon their property or a nuisance affecting their property,[27] or to restrain others from wrongfully using their corporate name, or from infringing a patent, trade-mark, or copyright.[28] They may file a bill of interpleader in a proper case, as where there are adverse claims to a dividend.[29] In like manner, a suit for an injunction or other equitable remedy may be maintained against a corporation under the same circumstances as against an individual.[30] A creditors' bill will lie against a corporation.[31]

§ 261. Libels in admiralty.

Corporations also have the same right as a natural person to maintain a libel in admiralty, *in rem* or *in personam,* to recover for salvage services or to enforce any other maritime contract, or to recover for a maritime tort.[32] And a libel in admiralty will lie against a corporation.

[26] See Iba v. Hannibal & St. Joseph R. Co., 45 Mo. 469; Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466; In re Manufacturers' Nat. Bank, 5 Biss. 499, Fed. Cas. No. 9,051.

[27] Central Bridge Corp. v. City of Lowell, 4 Gray (Mass.) 474.

[28] Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324; Newby v. Oregon Cent. Ry. Co., Deady, 609, Fed. Cas. No. 10,144; Dental Vulcanite Co. v. Wetherbee, 2 Cliff. 555, 3 Fish. Pat. Cas. 87, Fed. Cas. No. 3,810. See ante, § 53.

[29] Salisbury Mills v. Townsend, 109 Mass. 115.

[30] Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1; Kittel v. Augusta, Tallahassee & Gulf R. Co., 65 Fed. 862.

[31] Kittel v. Augusta, Tallahassee & Gulf R. Co., 65 Fed. 862.

[32] The Camanche, 8 Wall. (U. S.) 448.

§ 262. Remedies given by statute.

As a general rule, corporations are entitled, to the same extent as a natural person, to remedies provided by statute, though they may not be expressly mentioned in the statute, provided they are within its reason and purpose, for in such a case, as we have seen, the word "person" or other general term in the statute is to be construed as including corporations.[33]

Thus, it has been held that a corporation may proceed against a debtor under the statutes giving a remedy by way of attachment or garnishment;[34] that it may file a petition under the bankruptcy law,[35] or maintain a suit to quiet title to land.[36] And it was held that a corporation might sue in the United States court of claims under the abandoned and captured property act of congress, although not mentioned therein, as the remedy thereby given was not intended to be limited to natural persons.[37] Of course, this rule does not apply where it appears from the object of the statute or the nature of the remedy that the legislature could not have intended it to apply to corporations.[38]

In like manner, remedies given by statute will lie against corporations, though they may not be expressly mentioned in the statute, if they are within its reason and purpose. For example, where a statute gives a right of action for death caused by the wrongful act or neglect of another, such an action may be maintained against railroad companies and other corpora-

[33] Ante, § 24.

[34] Union Bank v. United States Bank, 4 Humph. (Tenn.) 369; Planters' & Merchants' Bank of Mobile v. Andrews, 8 Port. (Ala.) 404; Trenton Banking Co. v. Haverstick, 11 N. J. Law, 171; Bank of Augusta v. Conrey, 28 Miss. 667.

The fact that the statute requires an affidavit, and that a corporation, in the nature of things, cannot take an oath, does not render the statute inapplicable to corporations, for the affidavit may be made by an officer of the corporation. See the cases above cited.

[35] Ex parte Bank of England, 1 Swanst. 10.

[36] Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich, 153 Mass. 42.

[37] United States v. Home Ins. Co., 22 Wall. (U. S.) 99.

[38] Yonge v. Mobile & Ohio R. Co., 31 Ala. 422.

That a corporation cannot sue under a statute as a common informer, see 1 Kyd, Corp. 218; Weavers' Co. v. Forrest, 2 Strange, 1241.

tions.[39] Corporations may also be proceeded against under statutes allowing attachment;[40] and by the weight of authority they may be summoned and compelled to make disclosure as garnishee or trustee under the statutes relating to garnishment and trustee process, though there may be no express provision as to corporations in the statute.[41]

§ 263. Statutory conditions precedent to suit.

Sometimes a statute prescribes conditions precedent to the right of a corporation to maintain suits. Thus, in California it is provided that a corporation shall not maintain or defend any action relating to its property, or the rents, issues, or profits thereof, unless it shall have previously filed a certified copy of its articles of incorporation in the county in which such property is situated; and, if the objection is seasonably and properly raised, no suit in relation to its property, or the rents, issues, or profits thereof, can be maintained by a corporation until it has complied with the statute.[42]

The objection that the statute has not been complied with must be raised by a plea in abatement, or it is waived, for the statute affects the capacity to sue, and not the cause of action.[43]

[39] Donaldson v. Mississippi & Missouri R. Co., 18 Iowa, 280, 87 Am. Dec. 391; Fleming v. Texas Loan Agency, 87 Tex. 238; Chase v. American Steamboat Co., 10 R. I. 79; Southwestern R. Co. v. Paulk, 24 Ga. 356. And see ante, § 237(d).

[40] Union Bank v. United States Bank, 4 Humph. (Tenn.) 369; Bushel v. Commonwealth Ins. Co., 15 Serg. & R. (Pa.) 173; Breene v. Merchants' & Mechanics' Bank, 11 Colo. 97; South Carolina R. Co. v. McDonald, 5 Ga. 531.

[41] Knox v. Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33; Boyd v. Chesapeake & Ohio Canal Co., 17 Md. 195, 79 Am. Dec. 646; Baltimore & Ohio R. Co. v. Gallahue's Adm'rs, 12 Grat. (Va.) 665, 65 Am. Dec. 254; Libbey v. Hodgdon, 9 N. H. 394; Taylor v. Burlington & Missouri River R. Co., 5 Iowa, 115; Franklin Fire Ins. Co. v. West, 8 Watts & S. (Pa.) 350; Boyle v. Franklin Fire Ins. Co., 7 Watts & S. (Pa.) 76; St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 421.

Contra, Union Turnpike Road v. Jenkins, 2 Mass. 37; Holland v. Leslie, 2 Har. (Del.) 306.

[42] Civil Code Cal. § 299. The statute does not apply to an action against a corporation for work and labor done at its request. Weeks v. Garibaldi South Gold Min. Co., 73 Cal. 599.

[43] California Savings & Loan Soc. v. Harris, 111 Cal. 133; and see Labory v. Los Angeles Orphan Asylum, 97 Cal. 270; Boston Type & Stereotype Foundry v. Spooner, 5 Vt. 93.

It has been held that such a statute does not prevent a corporation from commencing an action, but merely suspends its right to maintain it, if proper objection is made; and that if a corporation complies with the statute after commencement of an action, but before the filing of a plea in abatement, the plea should be overruled.[44]

§ 264. Confession of judgment, compromise, and arbitration.

As an incident to the capacity to sue and be sued, a corporation has the power to confess judgment.[45] And as an incident to the capacity to sue and be sued, and the capacity to enter into contracts, it has the same power as a natural person to compromise suits brought by or against it,[46] or to agree to submit matters in dispute to arbitration.[47]

§ 265. Quo warranto, scire facias, and mandamus.

(a) Quo warranto.—An information in the nature of *quo warranto,* as we shall see more at length in a subsequent chapter, is the proper remedy, at the instance of the state, or of the attorney general on behalf of the state, to forfeit the charter of a corporation for misuser or nonuser of its franchises.[48] It is also the proper remedy to oust a corporation from the exercise of powers not conferred upon it by its charter;[49] and it is the

[44] California Savings & Loan Soc. v. Harris, 111 Cal. 133.

[45] Prouty v. Prouty & Barr Boot & Shoe Co., 155 Pa. St. 112; United States Electric Lighting Co. v. Leiter, 19 D. C. 575; Stratton v. Allen, 16 N. J. Eq. 229; Shute v. Keyser (Ariz.) 29 Pac. 386; Solomon v. C. M. Schneider & Co., 56 Neb. 680.

[46] First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 1 Keener's Cas. 717; Northern Liberty Market Co. v. Kelly, 113 U. S. 199; Farmers' Mutual Ins. Co. v. Meese, 49 Neb. 861; Moss v. Averell, 10 N. Y. 449; In re Norwich Provident Ins. Soc., 8 Ch. Div. 334. See ante, § 168.

[47] Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83; Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40, 1 Smith's Cas. 588; Brady v. City of Brooklyn, 1 Barb. (N. Y.) 584; Day v. Essex County Bank, 13 Vt. 97; Remington Paper Co. v. London Assurance Corp., 12 App. Div. (N. Y.) 218; Boston & Lowell R. Corp. v. Nashua & Lowell R. Corp., 139 Mass. 463. And see ante, § 168.

[48] Post, § 316 et seq.

[49] Ante, § 207.

proper remedy to oust persons from the exercise of corporate powers, when they have not been legally incorporated.[50]

(b) **Scire facias.**—*Scire facias* will lie, either by or against a corporation, in any case in which it will lie by or against a natural person, unless there is some restriction in its charter. Thus, it may be brought by or against a corporation to revive a judgment. At common law, *scire facias* was the proper remedy against a corporation to enforce a forfeiture of its charter, when there was a legally existing body capable of acting, but which had been guilty of an abuse of its powers, and it is still so in some jurisdictions. In most jurisdictions, however, this remedy has given place to the remedy by information in the nature of the writ of *quo warranto*.[51]

(c) **Mandamus.**—In the absence of any other adequate legal remedy, *mandamus* will lie against a corporation to compel it to perform a specific duty imposed upon it by its charter or by the general law.[52] Thus, *mandamus* will lie against a railroad company to compel it to restore a public highway, if it is under a duty to do so,[53] or to compel it to operate its road as required by law;[54] to compel a canal company to keep its canal in a navigable condition;[55] to compel a railroad company to deliver to a particular elevator whatever grain in bulk may be consigned to it;[56] to compel a waterworks company to erect necessary fire plugs for the purpose of furnishing a sufficient supply of water

[50] Ante, § 93 et seq.

[51] Post, § 317.

[52] Rex v. Nottingham Old Water Works Co., 6 Adol. & E. 355; Norris v. Irish Land Co., 8 El. & Bl. 512; People v. New York Cent. & Hudson River R. Co., 28 Hun (N. Y.) 543, 1 Keener's Cas. 311; Northern Pac. R. Co. v. Washington Territory, 142 U. S. 492, 1 Keener's Cas. 323; State v. Hannibal & St. Joseph R. Co., 86 Mo. 13; Com. v. New York, Pennsylvania & O. R. Co., 138 Pa. St. 58; Savannah & Ogeechee Canal Co. v. Shuman, 91 Ga. 400, 44 Am. St. Rep. 43; Com. v. Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184.

[53] State v. Hannibal & St. Joseph R. Co., 86 Mo. 13; Com. v. New York, Pennsylvania & O. R. Co., 138 Pa. St. 58.

[54] Union Pac. R. Co. v. Hall, 91 U. S. 343; Chicago & Northwestern Ry. Co. v. Crane, 113 U. S. 424; State v. Hartford & New Haven R. Co., 29 Conn. 538. Compare Northern Pac. R. Co. v. Washington Territory, 142 U. S. 492, 1 Keener's Cas. 323.

[55] Savannah & Ogeechee Canal Co. v. Shuman, 91 Ga. 400, 44 Am. St. Rep. 43.

[56] Chicago & Northwestern Ry. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690.

to extinguish fires;[57] or to compel a corporation to furnish to a tax officer or court, as required by law, a list of its stockholders for purposes of taxation.[58]

Mandamus is also a proper remedy in many cases to enforce rights of stockholders or members of corporations. Thus, as we shall see in subsequent chapters, *mandamus* will lie against a corporation to compel it to permit a stockholder or member to inspect its books,[59] or to compel it to restore to the privileges and rights of membership one who has been wrongfully excluded or disfranchised.[60]

§ 266. How suits must be brought.

A suit by or against a corporation is to be instituted and conducted in the same way as a suit by or against a natural person, unless there is some special charter or statutory provision to the contrary. Of course, if there is such a provision, it must be observed. In an Illinois case, for example, where the charter of a corporation required suits to be brought by the trustees of the corporation, it was held that suit could not be brought by the corporation in its own name.[61]

Suits by corporations must be instituted, as other acts by corporations must be done, by proper authority. As we shall presently see, the proper persons to authorize the commencement of a suit on behalf of a corporation are the directors, but the power to authorize suits may be vested in the president or other managing officer.[62]

As a general rule, both actions at law and suits in equity by or against corporations must be brought by or against the corporation itself in the corporate name,[63] though sometimes, by

[57] Borough of Easton v. Lehigh Water Co., 97 Pa. St. 554.

[58] Firemen's Ins. Co. v. City of Baltimore, 23 Md. 297.

[59] People v. Pacific Mail Steamship Co., 50 Barb. (N. Y.) 280; post, § 533.

[60] Medical & Surgical Society of Montgomery County v. Weatherly, 75 Ala. 248; State v. Georgia Medical Soc., 38 Ga. 608; post, § 373.

[61] Marsh v. Astoria Lodge, No. 112, I. O. O. F., 27 Ill. 421.

[62] See post, chapter XXIV.

[63] Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Smith's Cas. 253, 1 Cum. Cas. 792; Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131, 1 Smith's Cas. 33, 1 Cum. Cas. 38; Ogdensburgh Bank

express provision in a charter, an action is allowed to be brought in the name of a particular officer or officers. At common law an action to enforce a right belonging to a corporation, or to redress a wrong against a corporation, can never be brought by a stockholder in his own name, or even by all of the stockholders; and, as a general rule, the same is true of suits in equity, for a corporation and its stockholders, as we have seen, are separate and distinct persons in the law.[64] We shall see, however, in a subsequent chapter, that a stockholder may sue in equity in his own name, for the benefit of the corporation, to enforce rights of the corporation or redress or enjoin wrongs, if the officers of the corporation and a majority of the stockholders fraudulently refuse to sue, or are themselves guilty of the wrongs sought to be redressed or prevented.[65]

§ 267. Process, service, and appearance.

Process against a corporation must run against it in the corporate name, and not against its officers. Process against "A., president of" a certain corporation, is against A. individually, and not against the corporation.[66]

The mode of serving process upon corporations is regulated by statute, and the statutes vary more or less in the different states. The present New York statute, which may be given as an illustration, provides that personal service of a summons

v. Van Rensselaer, 6 Hill (N. Y.) 240.

An action, or an attachment or garnishment, or any other process, against "A., president of" a certain corporation, is against A. individually, and not against the corporation. Fidelity Ins., Trust & Safe Deposit Co. v. Shenandoah Valley R. Co., 33 W. Va. 761; Plemmons v. Southern Imp. Co., 108 N. C. 614; State v. Montegudo, 48 La. Ann. 1417.

[64] Tomlinson v. Bricklayers' Union, No. 1, 87 Ind. 308, 1 Cum. Cas. 308; Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131, 1 Smith's Cas. 33, 1 Cum. Cas. 38; Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Smith's Cas. 253, 1 Cum. Cas. 792. See, also, ante, § 5; post, § 537.

[65] Atwool v. Merryweather, L. R. 5 Eq. 464, note, 1 Smith's Cas. 273, 1 Cum. Cas. 717; Dodge v. Woolsey, 18 How. (U. S.) 331, 1 Smith's Cas. 257, 1 Cum. Cas. 739; Peabody v. Flint, 6 Allen (Mass.) 52, 1 Smith's Cas. 263, 1 Cum. Cas. 795. See, also, post, § 538 et seq.

[66] Plemmons v. Southern Imp. Co., 108 N. C. 614; State v. Montegudo, 48 La. Ann. 1417; Fidelity Ins., Trust & Safe Deposit Co. v. Shenandoah Valley R. Co., 33 W. Va. 761.

on a corporation, other than a city, must be made by delivering a copy thereof, within the state, "to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent."[67] In some jurisdictions, process is required by the statutes to be served upon a corporation by service upon its "managing agent," or upon a "general agent," and service is valid only when made upon a person falling within the designation. The general rule is that service of process, to be binding upon a corporation, must be made upon the identical officer or agent, or one of the officers or agents, prescribed by the statute.*

[67] Code Civil Proc. § 431. Personal service of a summons must be served on the city of New York by delivering a copy, within the state, "to the mayor, comptroller, or counsel to the corporation," and on any other city by delivering a copy within the state, "to the mayor, treasurer, counsel, attorney, or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name."

*Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204; First Nat. Bank of Ceredo v. Huntington Distilling Co., 41 W. Va. 530, 56 Am. St. Rep. 878; George v. American Ginning Co., 46 S. C. 1, 57 Am. St. Rep. 671; Union Pacific R. Co. v. Miller, 87 Ill. 45; Parke v. Commonwealth Ins. Co., 44 Pa. St. 422; Chambers v. King Wrought-Iron Bridge Manufactory, 16 Kan. 270; Aldrich v. Anchor Coal & Development Co., 24 Or. 32, 41 Am. St. Rep. 831; Cherry v. North & South R. Co., 59 Ga. 446; Doty v. Michigan Central R. Co., 8 Abb. Pr. (N. Y.) 427; Lake Shore & Michigan Southern Ry. Co. v. Hunt, 39 Mich. 469; Aiken v. Quartz Rock Mariposa Gold Min. Co., 6 Cal. 187; Kennedy v. Hibernia Savings & Loan Soc., 38 Cal. 151; Reddington v. Mariposa Land & Mining Co., 19 Hun (N. Y.) 405; Waco Lodge v. Wheeler, 59 Tex. 554; Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co., 50 Neb. 283, 61 Am. St. Rep. 573; Upper Mississippi Transp. Co. Whittaker, 16 Wis. 233.

Where a statute requires service on a "general agent," service on a special agent is insufficient. It was accordingly held in a late Colorado case, under such a statute, that a mining company was not bound by service of a summons upon its foreman, where there was a general agent by whom the foreman was employed, and where the foreman's duties were merely to oversee the laborers in the company's mine, keep their time, see that their work was done in mining fashion, and perform generally the duties of a mine boss, and, in the absence of the general agent, to sell ores, buy supplies, pay wages, and report his acts and doings to the general agent. Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204.

An officer or agent of a corporation cannot commence an action against a corporation, either as plaintiff or as attorney, by serving himself with the process necessary to commence the action, for when he undertakes to bring the action, he abandons, for the time and occasion, at least, his position as its officer or agent. George v.

Appearance.— A corporation may voluntarily appear in an action by attorney, and such appearance will have the same effect in conferring jurisdiction as appearance by a natural person.[68] At common law the only way in which a corporation aggregate can appear is by attorney, and therefore, at common law, a plea by a corporation aggregate must purport to be by attorney.[69]

American Ginning Co., 46 S. C. 1, 57 Am. St. Rep. 671. And see Buck v. Ashuelot Mfg. Co., 4 Allen (Mass.) 357; Rehm v. German Insurance & Savings Institution of Quincy, 125 Ind. 135.

The fact that the officers of a corporation know of the issuance of process against it does not dispense with the necessity for regular service as provided by statute. Harrell v. Mexico Cattle Co., 73 Tex. 612.

[68] Attorney General v. Guardian Mutual Life Ins. Co., 77 N. Y. 272.

[69] Nixon v. Southwestern Ins. Co., 47 Ill. 446; Kankakee Drainage Dist. v. Lake Fork Special Drainage Dist., 29 Ill. App. 86, 130 Ill. 261.

CHAPTER XV.

LEGISLATIVE CONTROL OVER CORPORATIONS.

§ 268. In general.
269. In the absence of constitutional prohibitions.
270. Constitutional prohibition against laws impairing the obligation of contracts.
271. What constitutes an impairment of contracts.
272. Exercise of the police power of the state.
273. Reservation of power to alter, amend, or repeal.
274. Extent of reserved power to repeal.
275. Extent of reserved power to alter or amend.
276. Impairment of vested rights.
277. Conditional reservation of power to alter, amend, or repeal.
278. Exercise of judicial powers by the legislature.
279. Acceptance of amendments.
280. Effect of repeal of charter.
281. Intention to repeal charter.
282. Control of corporations created by congress.
283. Control of territorial corporations.

§ 268. In general.—The following principles determine the power of the state to control or regulate private corporations, and to repeal, alter, or amend their charters:

(1) Such power is absolute and unlimited except in so far as it may be limited by the state or federal constitution.

(2) But a charter, when accepted, is a contract between the state and the corporation, within the meaning of the prohibition in the constitution of the United States against the passage by any state of laws impairing the obligation of contracts; and a charter, therefore, cannot be repealed or materially altered, or its effect otherwise impaired, at the mere will of the legislature, unless the power to repeal, alter, or amend it has been reserved by the state.

(3) Nor can the legislature pass a law impairing the obligation of contracts between the corporation and its stockholders or members.

(4) Nor can the legislature pass a law impairing the obligation of contracts between a corporation and third persons. But to repeal a charter or authorize it to dissolve does not impair the obligation of the contracts between it and its creditors, unless their remedy against its property is taken away.

(5) Legislation which merely affects the remedy by or against corporations is not unconstitutional, if it does not take away all remedy, or so reduce it as to have practically the same effect.

(6) The state, under the power of eminent domain, may take the property of a corporation, including its franchises, for a public use upon making due compensation.

(7) The constitutional prohibitions against impairing the obligation of contracts, and against the taking of property without due process of law, do not prevent the state from controlling and regulating corporations, in the exercise of its police power. In the exercise of this power—

(a) The legislature may regulate and control corporations in the use of their property, and in the conduct of their business, to any extent that may be necessary for the protection of the lives, health, comfort, and property of the citizens, and the preservation of good order and the public morals.

(b) But it cannot, under the pretense of exercising the police power, deprive a corporation of its property without compensation, or interfere with its exercise of the powers conferred upon it by its charter by regulations or prohibitions which are clearly not necessary or proper as a police measure.

(8) The state may, in granting a charter, reserve the power to repeal, alter, or amend the same at will, either in a special charter, or in a general law, or in the state constitution; and such a reservation will constitute a term of the contract between the corporation and the state. The effect of such a reservation is this:

(a) It gives the legislature the absolute power to repeal the charter, unless the reservation is conditional.

(b) It gives the legislature the power to make any alteration or amendment which will not defeat or substantially impair the object of the charter, and which the legislature may deem necessary to secure either that object or any other public or private rights.

(c) It gives the legislature power to confer upon a corporation additional powers which are merely auxiliary to the object for which the corporation was created.

(d) Such a reservation, however, does not authorize arbitrary, unreasonable, and oppressive amendments.

(e) Nor does it authorize amendments changing the fundamental character of the corporation, or empowering it to engage in an entirely different enterprise or business from that contemplated by its charter.

(f) Nor does it authorize alterations or amendments depriving a corporation, or its stockholders or creditors, of vested rights of property without due process of law.

(g) The legislature cannot reserve or exercise judicial powers.

(9) An amended charter, to be binding upon the corporation and its stockholders, must be expressly or impliedly accepted. But continuing to exercise corporate powers after an authorized amendment is an acceptance.

(10) An intention on the part of the legislature to repeal a charter by a later statute will not be implied, if any other reasonable construction can be placed upon the statute.

(11) The repeal of a charter dissolves the corporation, and it no longer exists for any purpose, but a court of equity will protect the rights of its stockholders and creditors in its property.

§ 269. In the absence of constitutional prohibitions.

Except in so far as its powers may be limited by constitutional prohibitions, the legislature creating a corporation has absolute control over it, and may repeal or amend its charter at will, and without the consent of the corporation or its mem-

bers. In England, parliament has absolute power in this respect, for there is no written constitution limiting its powers.[1] In the United States, however, it is different. The power of the state legislature is limited by the constitutions of the state and of the United States, and they can pass no valid act in violation of either. Their power, however, is just as absolute as the power of parliament, except in so far as it is thus restricted.[2]

§ 270. Constitutional prohibition against impairing the obligation of contracts.

(a) Charter involves a contract.—The constitution of the United States, which is binding upon the state legislatures, declares that no state shall pass any "law impairing the obligation of contracts;"[3] and, after some difference of opinion, it is now settled beyond any question that when the legislature of a state grants a charter to a *private* corporation, and it is accepted in accordance with its terms by the persons to whom it is granted, the charter involves a *contract* between the state and the corporation, and, in a sense, between the state and the corporators, within the meaning of this provision. The legislature, therefore, cannot by subsequent legislation repeal or materially change the charter of a private corporation without its consent, unless it has reserved the power to do so in granting the charter, without impairing the obligation of a contract, in violation

[1] See the arguments and opinions in Trustees of Dartmouth College v. Woodward, 1 N. H. 111, 4 Wheat. (U. S.) 518, 2 Smith's Cas. 622, 1 Keener's Cas. 139, 1 Cum. Cas. 490.

[2] "It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the constitution of the United States, or of the particular state in question." Per Chief Justice Redfield, in Thorpe v. Rutland & Burlington R. Co., 27 Vt. 141, 62 Am. Dec. 625, 2 Smith's Cas. 681, 1 Cum. Cas. 521.

[3] Const. U. S. art. 1, § 10.

of the constitution. A statute having this effect is absolutely void, and cannot in any way affect the rights or powers of the corporation.

The leading case on this point, known as the "Dartmouth College Case," was decided by the supreme court of the United States in 1819. The case was as follows: In 1769 the king of England granted a charter incorporating "The Trustees of Dartmouth College," for the purpose of maintaining a college founded and endowed by private individuals, and intrusting its management and control to certain individuals as the first trustees, and to their successors to be chosen by them. The corporation as thus constituted was, by the terms of the charter, to exist "from henceforth and forever," and was given the capacity to have "perpetual succession and continuance forever." Afterwards, in 1816, the legislature of New Hampshire passed acts materially amending this charter,[4] and the corporation, in an action of trover against an officer appointed under the acts, attacked them as void under the constitutional provision above quoted. The state court upheld the acts on the ground that the corporation was a public institution, subject to the control of the legislature, and that the charter was not a contract, within the meaning of the constitution, and gave judgment for the defendant. On writ of error, the case was argued before the supreme court of the United States by most eminent counsel, including Daniel Webster for the plaintiffs in error, and William Wirt for the defendant in error, and was reversed, opinions for reversal being delivered by Chief Justice Marshall and Justices Story and Washington.[5] The court held that the corporation was not public, but private, being founded and endowed by private means; that the charter was a contract, within the meaning of the constitution; and that the acts of the New Hampshire legislature impaired it, and were void.[6]

[4] As to the extent of the change, see post, § 271.

[5] Justices Johnson and Livingston concurred, and Justice Duvall dissented.

[6] Trustees of Dartmouth College v. Woodward, 1 N. H. 111, 4 Wheat. (U. S.) 518, 2 Smith's Cas. 622, 1 Keener's Cas. 139, 1 Cum.. Cas. 490.

Some doubt has been expressed as to the soundness of this decision, but it has been adhered to by the supreme court of the United States in the later cases,[7] and has been necessarily, and generally approvingly, followed by the state courts.[8]

In one of the later cases in the supreme court of the United States it was said: "Private charters or such as are granted for the private benefit of the corporators are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired without the assent of the corporators than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation

[7] Trustees of Vincennes University v. Indiana, 14 How. (U. S.) 268; Greenwood v. Union Freight R. Co., 105 U. S. 13, 2 Smith's Cas. 720, 1 Keener's Cas. 192, 1 Cum. Cas. 528; New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 1 Keener's Cas. 212; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; Wilmington & Weldon R. Co. v. Alsbrook, 146 U. S. 279; Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 1 Keener's Cas. 264; and many other cases more specifically cited in notes following.

[8] Derby Turnpike Co. v. Parks, 10 Conn. 522, 27 Am. Dec. 700; Bruffett v. Great Western R. Co., 25 Ill. 353; Union Mutual Life Ins. Co. v. Frear Stone Mfg. Co., 97 Ill. 537; Downing v. Indiana State Board of Agriculture, 129 Ind. 443: City of Louisville v. President, etc., of Louisville University, 15 B. Mon. (Ky.) 642; Pennsylvania R. Co. v. Baltimore & Ohio R. Co., 60 Md. 263; Boston & Lowell R. Corp. v. Salem & Lowell R. Co., 2 Gray (Mass.) 1; Central Bridge Corp. v. City of Lowell, 15 Gray (Mass.) 106; Flint & Fentonville Plank Road Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; City of Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140, 2 Smith's Cas. 791, 1 Keener's Cas. 186, 1 Cum. Cas. 560; Sloan v. Pacific R. Co., 61 Mo. 24, 21 Am. Rep. 397; Ashuelot R. Co. v. Elliot, 52 N. H. 387, 58 N. H. 451, 2 Smith's Cas. 768; Zabriskie v. Hackensack & New York R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617, 2 Smith's Cas. 760; People v. Manhattan Co., 9 Wend. (N. Y.) 351; Skaneateles Water-Works Co. v. Village of Skaneateles, 161 N. Y. 154; Wilmington & Weldon R. Co. v. Alsbrook, 110 N. C. 137 (affirmed 146 U. S. 279); Com. v. Pennsylvania Canal Co., 66 Pa. St. 41; Com. v. Erie & Western Transp. Co., 107 Pa. St. 112; Bank of Old Dominion v. McVeigh, 20 Grat. (Va.) 457; and other cases more specifically cited in the notes following.

The state constitution is a law, within the meaning of the clause in the federal constitution prohibiting laws impairing the obligation of contracts. New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 1 Keener's Cas. 212.

or in some general law of the state which was in operation at the time the charter was granted."[9]

(b) Corporations under general laws.—The right to corporate existence under general laws authorizing the formation of corporations, and the right to exercise the powers thereby granted, are just as much contract rights within the meaning of the constitution as if they had been conferred by a special act of incorporation.[10]

(c) Power before acceptance of charter.—In applying the constitutional provision above referred to, it must be borne in mind that a charter does not take effect and create a corporation until it has been accepted, and the acceptance must be in accordance with its terms, and by the persons to whom it is granted or offered. Before such acceptance, there is no contract, but a mere offer of a charter, and this offer, so long as it has not been changed into a contract by acceptance, may be revoked or changed by the legislature.[11]

(d) Provision not applicable to public corporations.—The doctrine that the charter of a corporation is a contract, within the meaning of the constitutional prohibition against laws impairing the obligation of contracts, does not apply to public corporations, such as cities, universities endowed and founded solely by the state, and the like. A public corporation, being created merely as an instrument of government, and not for private ends, is always subject to the control of the legislature. It may be created by the legislature without the consent of the members who compose it, and its charter may be amended or repealed by the legislature at will.

A corporation, however, is not public, so as to be subject to such control by the legislature, merely because its objects are of a public character. Railroad companies, canal companies, bridge companies, turnpike companies, water and gas com-

[9] Pennsylvania College Cases, 13 Wall. (U. S.) 190.

[10] Abbott v. Johnston, G. & K. Horse R. Co., 80 N. Y. 27; and many other cases cited in the notes preceding and following.

[11] Ante, § 44(i), and cases there cited.

panies, and the like, are called *quasi* public corporations, as we have seen, because of the public character of the enterprise; but they are private corporations, and therefore within the protection of the constitutional provision which we are now considering.[12] The same is true of colleges, universities, libraries, hospitals, and the like, though created for the purpose of administering a public charity, where they are founded and endowed by private individuals, and it can make no difference that they have also received donations of money or property from the state.[13] In Indiana a corporation for the purpose of advancing the agricultural interests of the state, composed of private individuals, was held to be a private corporation, and within the protection of the constitution, although it received donations from the state;[14] and there are many other cases to substantially the same effect.

§ 271. What constitutes an impairment of the obligation of contracts.

(a) In general.—Not only the total repeal of a charter, but any material alteration thereof, impairs the obligation of the contract created by the grant of a charter. In the Dartmouth College Case, hereinbefore referred to, the charter of the college was not totally repealed, but merely amended. The amendment, however, changed the name of the corporation from "The Trustees of Dartmouth College" to "The Trustees of

[12] Greenwood v. Union Freight R. Co., 105 U. S. 13, 2 Smith's Cas. 720, 1 Cum. Cas. 538, 1 Keener's Cas. 192; St. Louis, Iron Mountain & S. R. Co. v. Loftin, 30 Ark. 693; Derby Turnpike Co. v. Parks, 10 Conn. 522, 27 Am. Dec. 700; Bruffett v. Great Western R. Co., 25 Ill. 353; City of Covington v. Covington & Cincinnati Bridge Co., 10 Bush (Ky.) 69; Society for Establishing Useful Manufactures v. Morris Canal & Banking Co., 1 N. J. Eq. 157.

[13] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 2 Smith's Cas. 622, 1 Keener's Cas. 139, 1 Cum. Cas. 490; Trustees of Vincennes University v. Indiana, 14 How. (U. S.) 268; County Commissioners v. Colorado Seminary, 12 Colo. 497; City of Louisville v. President, etc., of Louisville University, 15 B. Mon. (Ky.) 642; Montpelier Academy Trustees v. George, 14 La. 395, 33 Am. Dec. 585; Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365; Cary Library v. Bliss, 151 Mass. 364.

[14] Downing v. Indiana State Board of Agriculture, 129 Ind. 443. See, also, ante, § 31.

Dartmouth University;" increased the number of trustees from twelve, the number fixed by the charter, to twenty-one, nine of whom to constitute a quorum; allowed the governor of the state and council to appoint the nine additional members, whereas the charter allowed the twelve trustees to choose their successors; empowered the trustees to organize colleges in the university, establish an institute, and elect fellows and members thereof; and created a board of overseers, twenty-five in number, to be appointed by the governor and council, with power to disapprove and negative votes of the trustees relative to the appointment and removal of the president, professors, and other officers, to salaries, and to the establishment of colleges and professorships, and the erection of new college buildings, whereas the whole management and control of such matters was vested by the charter in the twelve trustees. It was held that the alterations were material, and such as to impair the charter.[15]

(b) Impairment of exclusive franchise or privilege.—As we have seen in a previous chapter, the legislature may confer upon a private corporation an exclusive franchise or privilege, unless it is restricted by some constitutional prohibition.[16] If it does so, and the grant is valid, it cannot afterwards confer franchises or privileges upon another corporation or person which will interfere with such franchise or privilege, without violating the constitutional prohibition against laws impairing the obligation of contracts, unless it has reserved the power of alteration, amendment, or repeal.

For example, if the charter of a water or gas company gives it the exclusive franchise or privilege of constructing water or gas works, and supplying water or gas within a certain territory, a charter subsequently granted to another company to furnish water or gas within such territory impairs the obligation of the contract between the state and the first-mentioned company, and to that extent is void.[17] The same principle ap-

[15] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Smith's Cas. 622, 1 Keener's Cas. 139, 1 Cum. Cas. 490.

[16] Ante, § 39(c)(3).

[17] New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 1 Keen-

plies where the charter of a corporation gives it the exclusive privilege of constructing and maintaining a toll bridge at a certain point, and within a certain distance thereof.[18]

This rule only applies where the legislature has granted an exclusive franchise or privilege, and this particular franchise or privilege is impaired. The mere fact that the charter of a corporation confers the privilege of constructing a toll bridge, or a railroad, toll road, or canal, or water or gas works, and the like, does not prevent the legislature from afterwards granting such a privilege to another corporation in the same locality, though the effect may be to render the franchise of the first corporation of less value, or even of no value at all.[19] A municipal ordinance granting to a private corporation the right to construct and maintain waterworks for a certain time does not grant an exclusive franchise, and does not prevent the city from afterwards establishing a competing system.[20]

As between a corporation and the public, its charter and grants of franchises, as we have seen in another place, are to be construed strictly against the corporation and in favor of the

er's Cas. 212; New Orleans Water Works Co. v. Rivers, 115 U. S. 674.

It is otherwise if the legislature has reserved the power to alter, amend or repeal the charter. See post, § 275(b)(2).

[18] Binghampton Bridge, 3 Wall. (U. S.) 51, 1 Smith's Cas. 170.

[19] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. (U. S.) 420, 1 Smith's Cas. 157, 1 Keener's Cas. 157, 1 Cum. Cas. 506; Washington & Baltimore Turnpike Co. v. Baltimore & Ohio R. Co., 10 Gill & J. (Md.) 392; White River Turnpike Co. v. Vermont Cent. R. Co., 21 Vt. 590; Tuckahoe Canal Co. v. Tuckahoe & James River R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374.

[20] North Springs Water Co. v. City of Tacoma, 21 Wash. 517; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167; In re City of Brooklyn, 143 N. Y. 596; Skaneateles Water Works Co. v. Village of Skaneateles, 161 N. Y. 154.

In Capital City Light & Fuel Co. v. City of Tallahassee (Fla.) 28 So. 810, it was held that where a city, by ordinance, grants the exclusive use of its streets to a corporation for erecting poles, wires, etc., for an electric light plant, with a provision that the company shall not be required to furnish light until it can make a certain profit on its investment, the ordinance does not constitute a contract, the obligation of which is protected from impairment by the constitution, until the company has begun preparations for, or made expenditures towards, erecting a plant; and that, after it has failed for ten years to take any steps towards erecting a plant, the legislature may authorize the city to construct and operate a plant.

public, and therefore an intention on the part of the legislature to confer an exclusive privilege upon a corporation, and thereby deprive the state of the power to grant similar privileges to other corporations when the public good requires it to do so, is not to be implied, but must be conferred in express terms.[21]

An inviolable grant of an exclusive franchise to construct and maintain a bridge over a river at a certain point, or within a specified distance thereof, and to collect tolls for crossing the same, cannot be impaired by a subsequent grant to another corporation of the right to construct and maintain a toll bridge, but the right is not infringed by the construction and maintenance of an ordinary railroad bridge,[22] or a ferry.[23]

(c) Regulation of tolls and charges by quasi public corporations.—If the charter of a railroad company, water or gas company, turnpike company, or other *quasi* public corporation gives it the right to fix the amount of its charges or tolls, the right to do so is secured by the contract between the corporation and the state, and the legislature cannot impair such right by subsequent legislation reducing or limiting its charges,[24] unless the power to alter or amend the charter has been reserved.[25]

[21] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. (U. S.) 420, 1 Smith's Cas. 157, 1 Cum. Cas. 506, 1 Keener's Cas. 157. See ante, § 127(b)(2).

[22] Bridge Proprietors v. Hoboken Co., 1 Wall. (U. S.) 116; Mohawk Bridge Co. v. Utica & Schenectady R. Co., 6 Paige (N. Y.) 564.

[23] Parrott v. City of Lawrence, 2 Dill. 332, Fed. Cas. No. 10,772, 1 Smith's Cas. 175.

[24] City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, affirming 88 Fed. 720; Lake Shore & Michigan Southern Ry. Co. v. Smith, 173 U. S. 684, reversing 114 Mich. 460; Central Trust Co. v. Citizens' St. Ry. Co., 82 Fed. 1; Ball v. Rutland R. Co., 93 Fed. 513; Pingree v. Michigan Cent. R. Co., 118 Mich. 314; Skaneateles Water Works Co. v. Village of Skaneateles, 161 N. Y. 154; Philadelphia, Wilmington & B. R. Co. v. Bowers, 4 Houst. (Del.) 506; Covington & Lexington Turnpike Road Co. v. Sandford, 164 U. S. 578; Hamilton v. Keith, 5 Bush (Ky.) 458; Attorney General v. Chicago & Northwestern Ry. Co., 35 Wis. 425, 588; Sloan v. Pacific Railroad, 61 Mo. 24; and cases cited under section 272(c)(5), infra.

It is not necessary to show that the income of the corporation is thereby reduced. City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558.

A provision in the charter of a railroad company giving it the right to fix the rate of fares on its road within certain limits constitutes a contract between the state and the corporation, and a corporate franchise which passes by a sale (under legislative authority) of the company's property and franchises to another company;

Where the charter of a turnpike company gives it the right to charge tolls for vehicles, including bicycles, the legislature cannot constitutionally prohibit it from charging tolls for bicycles.[26]

In a late New York case it was held that a statute, passed after an authorized grant by a municipal corporation to a water company of the franchise of constructing waterworks and furnishing the inhabitants with water, and which permits the municipal corporation furnishing its inhabitants with water to establish a scale of rates for the use of water, and also rates for fire protection, to be assessed on all real property abutting on the mains, or within a certain distance of the hydrants, or on such real property so abutting, or within such distance as the board of water commissioners may deem beneficial, upon which real property the water is not used by the owner or occupant for domestic or manufacturing purposes, is in violation of the prohibition against laws impairing the obligation of contracts, since it carries on its face evidence of an intent to assist water commissioners in securing customers from the patrons of adversaries by means other than competition.[27]

As we shall see in a subsequent section, the legislature, in the exercise of the police power of the state, may make reasonable regulations as to the rates to be charged by railroad companies and other *quasi* public corporations, if it has not divested itself of such power by giving the corporation the right to charge a certain rate or to fix its rates.[28]

(d) Power to consolidate.—If the charter of a corporation gives it the power to consolidate with any other corporation, and

and it is no more subject to impairment by the legislature after the transfer than before. Ball v. Rutland R. Co., 93 Fed. 513.

[25] Post, § 275(b)(9); Beardsley v. New York, Lake Erie & W. R. Co., 17 Misc. Rep. (N. Y.) 256, 15 App. Div. 251.

[26] Rochester & Charlotte Turnpike Road Co. v. Joel, 41 App. Div. (N. Y.) 43.

[27] Skaneateles Water Works Co. v. Village of Skaneateles, 161 N. Y. 154, affirming 33 App. Div. 642; Warsaw Water Works Co. v. Village of Warsaw, 161 N. Y. 176, modifying 16 App. Div. 502.

[28] See post, § 272(c)(5). As to power of the legislature when it has reserved the power to alter, amend, or repeal a charter, see post, § 275(b)(9).

the right to alter or amend the charter is not reserved, the right to consolidate is secured by the contract, and cannot be taken away or impaired by subsequent legislation, except in so far as such legislation may come within the police power of the state. It is as much a part of the contract between the corporation and the state as the right to exist as a corporation.[29]

(e) Power to receive municipal subscriptions.—It is clear that if the charter of a corporation gives it the power to receive subscriptions to its capital stock from municipal corporations, and a consideration is given, the power cannot be taken away by subsequent legislation. Nor can the legislature impair the rights of the corporation under such a subscription after it has been made. It has been held, however, that a grant of such power in the charter of a corporation where no consideration has been given, and there has been no attempt to exercise the power, is not a contract between the corporation and the state, and may be restricted or withdrawn.[30] The fact that the inhabitants of a municipality have voted to subscribe is immaterial, for such a vote is not a subscription.[31]

(f) Impairment of contract between the corporation and its stockholders or members.—As we shall hereafter see, when persons become stockholders or members of a corporation, either at the time of its creation or organization or afterwards, there is a contract between them and the corporation, and, in a sense, a contract between them and the state; and these contracts are just as much within the protection of the constitutional prohibition against laws impairing the obligation of contracts as the contract between the state and the corporation. The state,

[29] Zimmer v. State, 30 Ark. 677.

As to the police power of the state in this respect, see post, § 272(c)(6). As to the reserved power to alter, amend, or repeal charters, see post, § 275(b)(10).

[30] Wilkes County Com'rs v. Call, 123 N. C. 308; Aspinwall v. Daviess County Com'rs, 22 How. (U. S.) 364; Wadsworth v. Eau Claire County Sup'rs, 102 U. S. 534; Town of Concord v. Portsmouth Sav. Bank, 92 U. S. 625; Norton v. Brownsville Board of Com'rs, 129 U. S. 479; Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 666, 1 Keener's Cas. 246; Falconer v. Buffalo & Jamestown R. Co., 69 N. Y. 491; Covington & Lexington R. Co. v. Kenton County Court, 12 B. Mon. (Ky.) 144; Wilson v. Polk County, 112 Mo. 126.

[31] See the cases above cited.

therefore, cannot pass any law which impairs the obligation of such contracts, unless it has reserved the power to alter, amend, or repeal the charter, and the law is within such reserved power.

For example, it has been held that the state cannot authorize a majority of the stockholders of a corporation to accept an amendment of its charter, against the dissent of the minority, and engage thereunder in a business or transaction which is not authorized by the original charter.[32] On the same principle it has been held that the legislature cannot amend the charter of a corporation by reducing the amount of capital stock required, and authorize a majority of the stockholders to accept the amendment against the dissent of the minority, where the effect will be to render stockholders liable on their subscriptions before the amount of capital stock required at the time of their subscriptions has been subscribed.[33]

The principle also applies to a statute amending the charter of a corporation so as to allow consolidation with other corporations;[34] or so as to allow cumulative voting at stockholders' meetings, or otherwise change the number of votes of stockholders, or method of voting, fixed by the charter;[35] or so as to directly or indirectly increase the liability of stockholders to the creditors of the corporation.[36]

The legislature cannot authorize a mutual insurance company to transform itself into a joint-stock company against the

[32] Zabriskie v. Hackensack & New York R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617, 2 Smith's Cas. 760, 1 Cum. Cas. 781; Black v. Delaware & Raritan Canal Co., 24 N. J. Eq. 456; New Orleans, Jackson & G. N. R. Co. v. Harris, 27 Miss. 517; Dow v. Northern Railroad, 67 N. H. 1, 2 Smith's Cas. 795.

[33] Old Town & Lincoln R. Co. v. Veazie, 39 Me. 571.

[34] Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

[35] State v. Greer, 78 Mo. 188; Hayes v. Com., 82 Pa. St. 518; Tucker v. Russell, 82 Fed. 263; In re Election of Directors of Newark Library Ass'n (N. J. Law) 43 Atl. 435. Compare New Haven & Derby R. Co. v. Chapman, 38 Conn. 56.

A statute amending the charter of a railroad company by repealing a provision that the voting power of the state as a stockholder shall be a certain number of votes, and that the voting power of each stockholder shall be ascertained by a fixed rule therein stated, is unconstitutional. Tucker v. Russell, 82 Fed. 263.

[36] Evans v. Nellis, 101 Fed. 920. But see post, § 272(c)(10).

will of a member who became such under a contract with the company before the grant of such authority.[37]

The power of the legislature to authorize a majority of the stockholders of a corporation to bind the minority will be further considered in a subsequent chapter in treating of the rights of stockholders.

(g) Impairment of contracts between the corporation and third persons—(1) Rights of corporation.—A law may also be unconstitutional as impairing the obligation of contracts between the corporation and third persons or other corporations. The legislature cannot constitutionally pass any law which will destroy or impair the vested rights of a corporation under a contract between it and a municipal corporation, or between it and any other corporation or person, authorized, expressly or impliedly, by its charter.[38] Thus, a valid contract between a street-railroad company and a city by which the company is given a franchise to construct and operate a street-railroad system on the streets of the city cannot be impaired by subsequent legislation.[39] A statute providing that suicide shall not be a defense to an action on any life insurance policy impairs the obligation of contracts as to all policies, containing a provision to the contrary, issued before the passage of the act.[40]

(2) Rights of creditors of corporation.—Nor can the legislature pass any valid law destroying or impairing the vested rights of creditors of a corporation.[41] Thus, it cannot, as to existing creditors, impair the statutory liability of stockholders. The effect of statutes which obligate the stockholders of a corporation to pay its indebtedness to an amount equal to the stock

[37] German Mutual Fire Ins. Co. v. Schwarzwaelder (N. J. Eq.) 44 Atl. 769, affirming order in Schwarzwaelder v. Tegen, 58 N. J. Law, 319.

[38] Jarman v. Knights Templars' & Masons' Life Indemnity Co., 95 Fed. 70; City Ry. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157.

[39] City Ry. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157. See, also, infra, this section (h), (i).

[40] Jarman v. Knights Templars' & Masons' Life Indemnity Co., 95 Fed. 70.

[41] Hawthorn v. Calef, 2 Wall. (U. S.) 10; People v. O'Brien, 45 Hun, 519, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 Smith's Cas. 728, 1 Keener's Cas. 228; Lothrop v. Stedman, 42 Conn. 584.

owned by them, and which authorize the institution and maintenance of proceedings by the creditors to enforce the liability, is to make the relation between the creditors and the stockholders contractual in its nature; and, being contractual, the relation is within the protection of the prohibition against laws impairing the obligation of contracts.[42]

——**(3) Repeal of charter—Dissolution of corporation.**—The constitutional prohibition against laws impairing the obligation of contracts does not prevent the legislature from repealing the charter of a corporation at any time with the consent of all the stockholders or members, or without their consent, where the charter reserves such power,[43] or from conferring upon them authority to dissolve before the expiration of their charter. In such a case, creditors of the corporation cannot object to the repeal or dissolution on the ground that the obligation of their contracts with the corporation is impaired within the meaning of the constitution. As we shall see in treating of the dissolution of corporations, there are two reasons for this. In the first place, the obligation of the contracts between a corporation and its creditors survives a dissolution of the corporation, and the creditors may enforce their claims against its property. In the second place, persons contracting with the corporation are presumed to know that a corporation, by the very terms and nature of its existence, is subject to dissolution, either by the surrender of its charter and acceptance of the surrender by the state, or by a forfeiture of its charter for misuser or nonuser.[44]

(h) Impairment of contract with municipality.—City or village ordinances, enacted under legislative authority, express or implied, granting franchises on specified conditions to a street-railroad company, telephone company, water, gas, or electric light company, or other corporation, when they are accepted

[42] Hawthorn v. Calef, 2 Wall. (U. S.) 10; Woodworth v. Bowles, 61 Kan. 569; McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 401; Barton Nat. Bank v. Atkins (Vt.) 47 Atl. 176.

[43] Post, §§ 274, 276.

[44] Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 2 Smith's Cas. 614, 1 Cum. Cas. 460. See, also, Thornton v. Marginal Freight Ry. Co., 123 Mass. 32, 1 Cum. Cas. 462. See post, § 303.

by the corporation, constitute or create a contract between the corporation and the municipality, and, as in the case of other contracts, the obligations thereof cannot be impaired by subsequent legislation, either by the state or by the municipality.[45]

Of course, to come within this principle, the ordinance must be such as to create a contract between the municipality and the corporation. Where a village ordinance granted to a water company for thirty years the right to furnish water to its inhabitants, and fixed, as just and reasonable, the rates to be charged, and a city to which the village was subsequently annexed passed an ordinance reducing the rates, and making them uniform with its rates, it was held that the ordinance was not in contravention of the constitutional prohibition against laws impairing the obligation of contracts, since the village ordinance did not establish a contract between the company and itself that consumers should pay the rates fixed for the whole period of thirty years, but was merely a declaration that such rates were reasonable.[46]

(i) Impairment of contract by municipal ordinance.—An ordinance adopted by a city or other municipal corporation under the authority conferred upon it by the legislature, and which impairs the obligation of a previous contract made by the city with a corporation, such as the contract involved in the grant of a franchise to a street-railroad company, water or gas company, and the like, is the same in effect as an enactment by the state legislature, and is equally within the prohibition against laws impairing the obligation of contracts.[47]

[45] Cleveland City Ry. Co. v. City of Cleveland, 94 Fed. 385; Southwest Missouri Light Co. v. City of Joplin, 101 Fed. 23; City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, affirming 88 Fed. 720; Little Falls Electric & Water Co. v. City of Little Falls, 102 Fed. 663; Skaneateles Water Works Co. v. Village of Skaneateles, 161 N. Y. 154; Clarksburg Electric Light Co. v. City of Clarksburg (W. Va.) 35 S. E. 994; Northwestern Tel. Exch. Co. v. City of Minneapolis (Minn.) 83 N. W. 527; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; Port of Mobile v. Louisville & Nashville R. Co., 84 Ala. 115, 5 Am. St. Rep. 342; City of Burlington v. Burlington Street Ry. Co., 49 Iowa, 144, 31 Am. Rep. 145; Michigan Telephone Co. v. City of St. Joseph, 121 Mich. 502. See, also, Stein v. City of Mobile, 49 Ala. 362, 20 Am. Rep. 283.

[46] Rogers Park Water Co. v. Fergus, 178 Ill. 571.

[47] Southwest Missouri Light Co.

(j) Legislation changing or affecting remedies.—The constitutional prohibition against laws impairing the obligation of contracts does not apply, as a rule, to laws which merely affect the remedy. The forms of administering justice, and the duties and powers of courts as an incident to the exercise of a branch of the sovereign power, must always be subject to legislative control, and the legislature cannot divest itself of power over them so as to bind subsequent legislatures.[48] "There is a difference," said Chief Justice Marshall, "between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate."[49]

It follows from this principle that a statute which merely changes the remedy provided by the charter of a corporation, or by a general law in force at the time of its creation or organization, for the enforcement of rights by or against it, or against its stockholders, without taking away the remedy altogether, or so reducing it as to have practically the same effect, is not objectionable as impairing the obligation of contracts. This is true, for example, of a statute prescribing a different form of action than is prescribed in the charter of a corporation or general law, or different rules of pleading, or a different mode of serving process.[50]

The legislature may change the remedy for enforcing the liability of stockholders on unpaid subscriptions, or their statutory liability to creditors,[51] provided it does not thereby, under the

v. City of Joplin, 101 Fed. 23; Little Falls Electric & Water Co. v. City of Little Falls, 102 Fed. 663; Northwestern Tel. Exch. Co. v. City of Minneapolis (Minn.) 83 N. W. 527. See supra, this section, (h), and cases there cited. Many other cases cited under this chapter are to the same effect.

[48] Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235.

[49] Young v. Bank of Alexandria, 4 Cranch (U. S.) 384.

[50] Cairo & Fulton R. Co. v. Hecht, 95 U. S. 168, affirming 29 Ark. 661. See, also, Chicago Life Ins. Co. v. Auditor, 101 Ill. 82; Carey v. Giles, 9 Ga. 253.

[51] Com. v. Cochituate Bank, 3 Allen (Mass.) 42; Hill v. Merchants' Mutual Ins. Co., 134 U. S. 515, affirming 86 Mo. 472, which

guise of changing the remedy, increase the liability of the stockholders, or impair the rights of the creditors.[52] It may repeal a provision in the charter of a railroad company requiring the owner of stock killed by the negligence of the company to sue for damages within six months.[53] And it may change the remedy prescribed by the charter of a turnpike company for compelling it to keep its road in repair.[54]

In a late New York case it was held by the court of appeals that a statute amending the insurance corporations law, by providing that no order restraining or interfering with the business of an insurance company should be made except upon the application of the attorney general, did not impair the obligation of the contracts between an insurance company and its policy holders, not only because it furnished a sufficient remedy to compel the company to perform the agreements contained in its policies, but also because it was remedial merely.[55] In a later case in the appellate division this case was distinguished, and it was held that a statute providing that no proceedings should be brought, or order made, for an accounting, or enjoining or interfering with the prosecution of the business of any insurance company, or applying for a receiver, except on application of the attorney general, was unconstitutional in so far as it denied to a policy holder in a mutual insurance company, who became such before the passage of the law, the right to sue for

affirmed 12 Mo. App. 148; Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. (Minn.) 83 N. W. 36; Willis v. Mabon, 48 Minn. 140; Smith v. Bryan, 34 Ill. 364; Pearsons v. Gardiner, 26 Misc. Rep. (N. Y.) 663, 42 App. Div. 490.

Where a statute made stockholders of banks individually liable for the debts of the bank to the extent of the par value of their stock, and gave the creditors of an insolvent bank the right to maintain one suit against all the stockholders by one creditor for the benefit of himself and all other creditors, it was held that a subsequent statute providing that a suit against the stockholders should be brought only in the name of the receiver of the bank did not impair the obligation of contracts. Persons v. Gardiner, 26 Misc. Rep. (N. Y.) 663, 42 App. Div. 490.

[52] Evans v. Nellis, 101 Fed. 920. And see infra, this section, (f) and (g).

[53] Louisville & Nashville R. Co. v. Williams (Ky.) 45 S. W. 229.

[54] Williamsport & Hagerstown Turnpike Co. v. Startzman, 86 Md. 363.

[55] Swan v. Mutual Reserve Fund Life Ass'n, 155 N. Y. 9, affirming 20 App. Div. 255.

his share of the net surplus of the company under his policy. "While it may be conceded," said Judge Woodward, "that the legislature has a right to protect its creatures against equitable actions by individual policy holders, calculated to embarrass the affairs of the corporation, and to interfere with the higher rights of the policy holders as a whole, it cannot be successfully maintained that the legislature is acting within its constitutional sphere in attempting to make the right of an individual to bring an action upon a contract to depend upon the whim or caprice of a public official."[56]

In some of the state constitutions there is a prohibition against laws impairing the obligation of contracts, "or depriving a party of any remedy for enforcing a contract which existed when the contract was made."[57]

(k) Extension of corporate existence beyond the period limited in the charter.—If the period of existence of a corporation is limited by its charter, and the legislature has not reserved any right to alter or amend the charter, it is clear that it cannot constitutionally extend the period of its existence, without its consent and the consent of all the stockholders, for the purpose of continuance of its business beyond the period limited. But after a corporation has been created for a limited time, the legislature may constitutionally continue its existence for a certain period for the purpose, not of continuing its business, but of prosecuting and defending suits, and of enabling it to gradually settle and wind up its affairs and distribute its capital stock. Such a statute does not impair any rights, either of the corporation, or of its stockholders, or of its creditors, but merely provides a remedy for the enforcement of rights which, in the absence of any statute, would be recognized and enforced in equity, creditors of a dissolved corporation having the right in equity to have their claims paid out of the assets of the corporation before any distribution of the same among the stock-

[56] Greeff v. Equitable Life Assurance Soc., 40 App. Div. (N. Y.) 180.

[57] See Western Nat. Bank of New York v. Reckless, 96 Fed. 70.

holders.[58] In a Massachusetts case, after a corporation had been created for twenty years, a general law was enacted by the legislature extending the existence of all corporations, whether previously or subsequently created, for the term of three years after the expiration of the period limited in their charters, for the purpose of prosecuting and defending all suits, and of enabling them to gradually settle and close their concerns, and to divide their capital stock, but not for the purpose of continuing their business; and the law was upheld as constitutional, in so far as it allowed creditors of an existing corporation to sue it after expiration of the period of its existence limited in its charter.[59]

(1) Exercise of the power of eminent domain.—The fact that the charter of a private corporation involves a contract between the state and the corporation, within the meaning of the constitutional prohibition against laws impairing the obligation of contracts, does not exempt the corporation from the exercise of the state's power of eminent domain. Any property of a corporation, including its franchises, may be taken by the state for public use under the power of eminent domain, or by another corporation under authority from the state, upon making due compensation.[60] For example, an ordinary railroad company, or a street-railroad company, may be authorized to take or use the road of another corporation on making due compensation.[61] And a bridge constructed and owned by a corporation may be condemned and taken as part of a public highway.[62]

[58] Foster v. Essex Bank, 16 Mass. 245, 8 Am. Dec. 135, 2 Smith's Cas. 608, 1 Cum. Cas. 464; Thornton v. Marginal Freight Ry. Co., 123 Mass. 32, 1 Cum. Cas. 462; post, § 303.

[59] Foster v. Essex Bank, 16 Mass. 245, 8 Am. Dec. 135, 2 Smith's Cas. 608, 1 Cum. Cas. 464. And see the other cases in the note preceding.

[60] Greenwood v. Union Freight R. Co., 105 U. S. 13, 2 Smith's Cas. 720, 1 Keener's Cas. 192, 1 Cum. Cas. 538; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 1 Keener's Cas. 174; Eastern R. Co. v. Boston & Maine Railroad, 111 Mass. 125, 15 Am. Rep. 13; Village of Hyde Park v. Oakwoods Cemetery Ass'n, 119 Ill. 141; Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 9 Am. St. Rep. 128; Opinion of Justices, 66 N. H. 629, 2 Smith's Cas. 803.

For a valuable note on the condemnation of corporate property and franchises under the power of eminent domain, see 9 Am. St. Rep. 137-147, where a great number of cases are collected.

[61] Greenwood v. Union Freight R. Co., 105 U. S. 13, 2 Smith's Cas.

(m) Consent of corporation and waiver of objection.—The constitutional prohibition against laws impairing the obligation of contracts does not prevent the legislature from amending the charter of a corporation with its consent,—with the consent of all the corporators, or with the consent of a majority, where the amendment is one which the majority may accept against the dissent of the minority, as elsewhere explained;[63] or from authorizing the corporators to amend.[64]

No one but the corporation or the stockholders can object to an act of the legislature on the ground that it impairs the obligation of the contract between the state and the corporation, and any objection on this ground is waived by the corporation if it accepts the act, either expressly, or impliedly by the exercise of powers under it.[65]

§ 272. Exercise of the police power of the state.

(a) In general.—The constitutional prohibition against the passage of laws by a state impairing the obligation of contracts does not exempt corporations from the police power of the state. With respect to this power, corporations are in substantially the same position as natural persons. The constitution

720, 1 Cum. Cas. 538, 1 Keener's Cas. 192.

[62] West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 1 Keener's Cas. 174.

When the public good requires a right of way free to all, the property and franchise of tollroad company may be taken under the power of eminent domain, upon making just compensation for the purpose of a free public highway. And the right to thus exercise the power of eminent domain is not affected by the fact that the charter of the company permits the state, within a certain time, and upon certain conditions, to purchase its property. Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466.

[63] Ante, § 57, post, chapter XXIV.

[64] State v. Montgomery Light Co., 102 Ala. 594; Pennsylvania R. Co. v. Duncan, 111 Pa. St. 352; Phinney v. Trustees of Sheppard & Enoch Pratt Hospital, 88 Md. 633.

[65] Pennsylvania R. Co. v. Duncan, 111 Pa. St. 352; Monongahela Bridge Co. v. Pittsburgh & Birmingham Ry. Co., 114 Pa. St. 478. And see Phinney v. Trustees of Sheppard & Enoch Pratt Hospital, 88 Md. 633; People v. Globe Mutual Life Ins. Co., 60 How. Pr. (N. Y.) 82.

It was held, however, that the fact that a turnpike company, claiming under its charter exemption from legislation reducing its rates of toll below a certain amount, collected tolls at a reduced rate fixed by a statute in violation of such exemption, was not a recognition of right of the legislature to amend or repeal its charter at will, and did not waive

prevents the legislature from depriving a corporation of powers which are secured to it by its contract with the state,—that is, by its charter,—but it does not prevent the legislature from controlling a corporation, and regulating its conduct, just as it may control and regulate the conduct of a natural person, in the exercise of the police power of the state, in so far as it may be necessary to do so in the interest of the public safety, health, property, comfort, or morals.[66] Indeed, this is a power of which the legislature cannot divest itself or a future legislature.

"Whatever differences of opinion," said Mr. Justice Bradley, in the supreme court of the United States, "may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of ob-

its right to attack the statute as unconstitutional. Covington & Lexington Turnpike Road Co. v. Sandford, 164 U. S. 578.

[66] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 2 Smith's Cas. 692, 1 Cum. Cas. 533; Thorpe v. Rutland & Burlington R. Co., 27 Vt. 140, 62 Am. Dec. 625, 2 Smith's Cas. 681, 1 Cum. Cas. 521; Chicago, Burlington & Q. R. Co. v. Iowa, 94 U. S. 155, 2 Smith's Cas. 695; Stone v. Mississippi, 101 U. S. 814, 1 Keener's Cas. 180; Regan v. Farmers' Loan & Trust Co., 154 U. S. 362, 2 Smith's Cas. 699, 1 Keener's Cas. 253; Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, 1 Keener's Cas. 207; Eagle Ins. Co. v. Ohio, 153 U. S. 446, 2 Smith's Cas. 704; Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 1 Keener's Cas. 201 (which was followed in Eagle Ins. Co. v. Ohio, 153 U. S. 446, 2 Smith's Cas. 704).

See, also, Boyd v. Alabama, 94 U. S. 645; Hennington v. Georgia, 163 U. S. 299, 1 Keener's Cas. 291; Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U. S. 659; Chicago, Burlington & Q. R. Co. v. Nebraska, 170 U. S. 57; Galena & Chicago Union R. Co. v. Loomis, 13 Ill. 548, 56 Am. Dec. 471; Toledo, Wabash & W. Ry. Co. v. City of Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71; New Albany & Salem R. Co. v. Tilton, 12 Ind. 3, 74 Am. Dec. 195; Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559; Chicago, Milwaukee & St. P. Ry. Co. v. City of Milwaukee, 97 Wis. 418; Com. v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555, 1 Cum. Cas. 546; Gorman v. Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 46 Am. St. Rep. 92; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657. And see the other cases more specifically cited in the notes following.

jects which demand the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."[67]

In an Illinois case it was said: "The trouble has been in considering what the legislature may and may not do with corporations of its own creation, that we have too much lost sight of the distinction between those powers which are secured to them by contract and those which are mere endowments of existence. The former are their property, of which they cannot be deprived without just compensation; the latter are elements of existence, imparted to them by the law of their being, and are held by them like the natural rights of the natural person, subject to be controlled and modified by the legislature, the same as it may control and modify the natural endowments of the natural person. It may not be easy at all times to distinguish between those rights which are secured by the contract contained in their charter, and those powers which are conferred upon them as capacities or elements of their being. Indeed the judicial mind has not to any great extent been led to inquire into this distinction, but it has been mostly occupied in defending and maintaining those rights which are secured by what is called this legislative contract, and it has required all the weight of the judicial department of the government to protect these rights against the encroachments which have been sometimes attempted by the strong arm of the legislature. While we must be unyielding in resistance to such encroachments whenever attempted, we must not forget that these artificial beings must be subject to government and subordinate to legislation, precisely the same as an individual or natural person."[68]

[67] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 2 Smith's Cas. 692, 1 Cum. Cas. 533 (citing Boyd v. Alabama, 94 U. S. 645).

[68] Bank of Republic v. Hamilton County, 21 Ill. 53. See, also, Reapers' Bank v. Willard, 24 Ill. 433, 76 Am. Dec. 755.

"No legislature," said Chief Justice Waite, "can bargain away the public health or the public morals. The people themselves can-

——**Withdrawal of matters from the police power by constitutional provision.**—The principle that the legislature cannot waive or divest itself of the police power of the state does not apply to constitutional provisions. The people of the state may adopt a constitutional provision withdrawing from the scope of the police power to be exercised by the legislature any matters which would, except for such withdrawal, be within the police power, and which could not be so withdrawn by the legislature; and if they do so by irrevocably granting a particular privilege to a corporation, they cannot afterwards, by the adoption of a new constitutional provision, impair such privilege. For this reason, where the constitution of Louisiana revived and confirmed the charter of the Louisiana Lottery Company, granted it the right to maintain a lottery for a certain number of years, and declared that the grant should constitute a contract between the corporation and the state, it was held that the grant could not be withdrawn or impaired by the subsequent adoption of a constitutional provision declaring lotteries unlawful. Although such a grant by the legislature would have been subject to repeal or change by the legislature under the police power of the state, the constitution had withdrawn the matter, as far as this company was concerned, from the scope of the police power.*

(b) Extent of the police power in general.—There have been differences of opinion as to the extent and boundaries of the

not do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." Stone v. Mississippi, 101 U. S. 814, 819, 1 Keener's Cas. 180.

"The great object of an incorporation," said Chief Justice Marshall, "is to bestow the character and properties of individuality on a collective and changing body of men. * * * Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist." Providence Bank v. Billings, 4 Pet. (U. S.) 514.

*New Orleans v. Houston, 119 U. S. 265. See post, § 272(e)(2).

police power of the state, but, as was said by Mr. Justice Bradley, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.[69] Any legislation regulating the business of corporations which may seem to the legislature to be necessary in order to accomplish these objects is within the police power of the state, and is not a violation of the charter of a corporation, within the meaning of the constitutional prohibition against laws impairing the obligation of contracts. And it can make no difference that such legislation incidentally lessens, or even prevents altogether, the business for which the corporation was created.[70] The legislature, however, cannot, under the pretense of exercising the police power, deprive a corporation of its property without compensation, or interfere with its exercise of the powers conferred upon it by its charter, by regulations and prohibitions which do not fairly and reasonably fall within the police power of the state.[71]

In a Missouri case it was said: "(1) The police power of a state can only be exercised with reference to some subject apparently connected with the public welfare. (2) When exercised with reference to such subjects, the limits of its exercise are, in a very large measure, in the sound discretion of the legislature. (3) This discretion, however, is not absolute and

[69] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 2 Smith's Cas. 692, 1 Cum. Cas. 533; and cases hereafter cited.

"This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, 'sic utere tuo ut alienum non laedas,' which, being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." Per Chief Justice Redfield, in Thorpe v. Rutland & Burlington R. Co., 27 Vt. 141, 62 Am. Dec. 625, 2 Smith's Cas. 681, 1 Cum. Cas. 521.

[70] See Stone v. Mississippi, 101 U. S. 814, 1 Keener's Cas. 180; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 2 Smith's Cas. 692, 1 Cum. Cas. 533.

[71] Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 1 Keener's Cas. 253, 2 Smith's Cas. 699; Stone v. Mississippi, 101 U. S. 814, 1 Keener's Cas. 180; Jemison v. Planters' & Merchants' Bank, 23 Ala. 168; People v. Jackson & Michigan Plank Road Co., 9 Mich. 285. See the illustrations referred to in the paragraphs following.

unrestrained. The power cannot be exercised capriciously, so as to strike down the right of liberty or property when no real or apparent public benefit will be promoted thereby."[72]

(c) **Particular cases—(1) Prohibitory liquor laws.**—In a leading case in the supreme court of the United States it was held that an act of the legislature prohibiting generally the sale of intoxicating liquors was not unconstitutional as applied to a private corporation which had been chartered prior to the passage of the act, and which was expressly authorized by its charter to manufacture malt liquors of all kinds, and impliedly authorized to sell the same.

"Although this right or capacity was granted in the most unqualified form," said Mr. Justice Bradley, "it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state."[73]

It was said in this case, however, that the corporation could not be prohibited from disposing of liquors already manufactured by it under the authority conferred by its charter, unless compensated for the loss.[74]

[72] State v. Addington, 12 Mo. App. 214, 77 Mo. 110.

[73] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 2 Smith's Cas. 692, 1 Cum. Cas. 533. See, also, Com. v. Certain Intoxicating Liqu rs, 115 Mass. 153.

"The authority of the legislature over the property or the use of the property of a corporation is not lost because no power is reserved to repeal or amend its charter. Any laws the sovereign power may find it necessary or salutary to enact, regulating, controlling, restricting or prohibiting the sale of a particular kind of property for the general benefit, apply as well to the property of corporations, like the claimant, as to individuals. Such laws are in the nature of police regulations, and individuals and corporations are alike subject to them." Com. v. Certain Intoxicating Liquors, 115 Mass. 153.

[74] Boston Beer Co. v. Massachu-

——(2) **Prohibition of lotteries.**—The police power of the state, since it extends to the preservation of good order and public morals, clearly includes the power to prohibit gambling in any form, including lotteries. It has been held, therefore, that the grant of a charter to a corporation, authorizing it to sell or dispose of property by conducting a lottery for a certain time, does not prevent the people of the state from afterwards adopting a constitutional provision, or a subsequent legislature from enacting a statute, prohibiting lotteries, and thus making the business of the corporation unlawful. Since the power to prohibit lotteries and other forms of gambling is within the police power of the state, the legislature cannot, by a charter or otherwise, preclude the people or subsequent legislatures from prohibiting the same.[75]

——(3) **Protection of fish.**—A grant in the charter of a corporation of the right to construct and maintain a dam across a river or stream, in which fish are accustomed to pass, is sub-

setts, 97 U. S. 25, 2 Smith's Cas. 692, 1 Cum. Cas. 533.

[75] Stone v. Mississippi, 101 U. S. 814, 1 Keener's Cas. 180. "Lotteries," said Chief Justice Waite in this case, "are not, in the legal acceptation of the term, mala in se, but may properly be made mala prohibita. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance, or otherwise,' might be 'awarded' to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

This does not apply where the right to conduct a lottery is granted by the constitution, and not by a mere act of the legislature, for, as we have seen, the constitution of a state may withdraw from the scope of the police power to be exercised by the legislature matters which, except for such withdrawal, would be within the police power, and which could not be withdrawn therefrom by the legislature. New Orleans v. Houston, 119 U. S. 265. See ante, § 272(a).

ject to the power of the state to afterwards require the corporation to construct and maintain suitable fishways, so as to allow their unobstructed passage, unless the charter in express terms or by necessary implication deprives the legislature of such power.[76]

(4) Regulations as to the construction and operation of railroads.—It is well settled that the police power of the state includes the power to control and regulate a railroad company in the conduct of the business authorized by its charter, in so far as it may be necessary in order to secure the safety, health, and comfort of the public at large, and to protect property. For this reason it has been held that the legislature may require railroad companies, at their own expense, to construct and maintain a safe roadbed and tracks, to maintain gates or watchmen where their road crosses other railroads or highways, to construct and maintain fences along the line of their road, and cattle guards at crossings, to use safe brakes and couplings on their trains, to employ a certain number of brakemen thereon, to ring a bell and blow a whistle on approaching highway crossings, to use safe smokestacks on their engines, so as to prevent the emission of sparks, etc., and to impose a penalty for failure to do so.[77]

[76] Commissioners of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247. And see Com. v. Essex Co., 13 Gray (Mass.) 239, 2 Smith's Cas. 745, 1 Cum. Cas. 550. See, also, post, § 275(b)(1).

[77] Thorpe v. Rutland & Burlington R. Co., 27 Vt. 141, 62 Am. Dec. 625, 2 Smith's Cas. 681, 1 Cum. Cas. 521; St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1; Hegeman v. Western R. Co., 16 Barb. (N. Y.) 353; Waldron v. Renssalaer & Saratoga R. Co., 8 Barb. (N. Y.) 390; Galena & Chicago Union R. Co. v. Loomis, 13 Ill. 548, 56 Am. Dec. 471; Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. P. Ry. Co., 62 Fed. 904; Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, 1 Keener's Cas. 207; Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U. S. 26; Minneapolis & St. Louis Ry. Co. v. Emmons, 149 U. S. 364; Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, affirming 33 Kan. 298; Chicago, Burlington & Q. R. Co. v. Nebraska, 170 U. S. 57; New York & New England R. Co. v. Town of Bristol, 151 U. S. 556, 1 Keener's Cas. 246, affirming 62 Conn. 527; Chicago, Milwaukee & St. P. Ry. Co. v. City of Milwaukee, 97 Wis. 418; Jacobson v. Wisconsin, Minnesota & Pac. R. Co., 71 Minn. 519; Cleveland, Cincinnati, Chicago & St. L. Ry. Co. v. People, 175 Ill. 359; Lake Shore & Michigan Southern Ry. Co. v. Ohio, 173 U. S. 285; Baltimore & Ohio R. Co. v. Kreager, 61 Ohio St. 312.

All railroad companies may be required so to conduct themselves as to other persons natural or

To secure the safety and health of the public and protect stock, they may be prohibited from carrying persons or live stock infected with a contagious disease, and they may be prohibited from crossing highways or other railroads at grade, and required to lower their tracks or to construct bridges at such crossings at their own expense.[78] For the convenience and comfort of the

corporate as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances. Per Chief Justice Redfield, in Thorpe v. Rutland & Burlington R. Co., 27 Vt. 141, 62 Am. Dec. 625, 2 Smith's Cas. 681, 1 Cum. Cas. 521. It was further said in this case: "There would be no end of illustrations upon this subject, which, in the detail are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be." Citing Hegeman v. Western R. Co., 16 Barb. (N. Y.) 353.

The legislature may regulate the operation of railroads by existing corporations by making them absolutely liable for property destroyed by fire communicated by their locomotives, and giving them an insurable interest in the property along the line of their roads. St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1. See, also, Chapman v. Atlantic & St. Lawrence R. Co., 37 Me. 92; Sherman v. Maine Cent. R. Co., 86 Me. 422; Hooksett v. Concord R. Co., 38 N. H. 242; Smith v. Boston & Maine Railroad, 63 N. H. 25; Grissell v. Housatonic R. Co., 54 Conn. 447; Rodemacher v. Milwaukee & St. Paul R. Co., 41 Iowa, 297; Gorman v. Pacific R. Co., 26 Mo. 441; Mathews v. St. Louis & San Francisco Ry. Co., 121 Mo. 298; Union Pac. Ry. Co. v. DeBusk, 12 Colo. 294; McCandless v. Richmond & Danville R. Co., 38 S. C. 103; Baltimore & Ohio R. Co. v. Kreager, 61 Ohio St. 312.

The legislature may make existing railroad companies liable in double damages for stock killed on their road, if they fail to fence the road. Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, 1 Keener's Cas. 207.

And it may regulate railroad companies by providing that the railroad commissioners may compel them to put in a connecting switch at a crossing, and to transfer and interchange loaded cars and make joint rates. Jacobson v. Wisconsin, Minnesota & Pac. R. Co., 71 Minn. 519.

That railroad companies may be compelled to stop passenger trains at stations for the accommodation of passengers, see Lake Shore & Michigan Southern Ry. Co. v. Ohio, 173 U. S. 285; Cleveland, Cincinnati, Chicago & St. L. Ry. Co. v. People, 175 Ill. 359; and other cases cited at the beginning of this note.

[78] New York & New England R. Co. v. Town of Bristol, 151 U. S. 556, 1 Keener's Cas. 246, affirming 62 Conn. 527; Pittsburgh & Connellsville R. Co. v. Southwest Pennsylvania Ry. Co., 77 Pa. St.

public, railroad companies may also be required to establish stations at crossings and other places, at their own expense, and to stop there to take on and discharge passengers or goods.[79] And they may be prohibited from running freight trains within the state on Sunday.[80]

——**(5) Regulation of charges of quasi public corporations.**—It is well settled that the police power of the state extends to the reasonable regulation and limitation of the rates that may be charged by *quasi* public corporations like railroad companies, canal companies, water and gas companies, and the like,[81] and by other corporations whose business is in the nature of a public employment, so as to affect the public generally, as in the case of warehouse companies,[82] provided the charter of the corporation does not fix the rate that may be charged, or give the corporation the power to fix it.[83]

The power of the legislature in this respect, however, is not unlimited. The regulation must be reasonable. "This power to regulate," it has been said, "is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."[84] The leg-

173; People v. Boston & Albany R. Co., 70 N. Y. 569.

[79] Com. v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555, 1 Cum. Cas. 546; Chicago & Alton R. Co. v. People, 105 Ill. 657; Railroad Commissioners v. Portland & Oxford Cent. R. Co., 63 Me. 270; Northern Pac. R. Co. v. Washington Territory, 142 U. S. 492, 1 Keener's Cas. 323.

[80] Hennington v. Georgia, 163 U. S. 299, 1 Keener's Cas. 291.

[81] Chicago, Burlington & Q. R. Co. v. Iowa, 94 U. S. 155, 2 Smith's Cas. 695; Stone v. Farmers' Loan & Trust Co. (Railroad Commission Cases) 116 U. S. 307; Illinois Cent. R. Co. v. People, 95 Ill. 313; Lake Shore & Michigan Southern Ry. Co. v. Smith, 173 U. S. 684; Ruggles v. People, 91 Ill. 256; Rogers Park Water Co. v. Fergus, 178 Ill. 571, as to which see ante, § 271(h); City of Danville v. Danville Water Co., 180 Ill. 235; City of Indianapolis v. Navin, 151 Ind. 139.

[82] Munn v. Illinois, 94 U. S. 113.

[83] Central Trust Co. of New York v. Citizens' St. Ry. Co. of Indianapolis, 82 Fed. 1. And see ante, § 271(c).

[84] Stone v. Farmers' Loan & Trust Co. (Railroad Commission Cases) 116 U. S. 307. And see Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 2 Smith's Cas. 699, 1 Keener's Cas. 253; Lake Shore & Michigan Southern Ry.

islature is not the sole and final judge in determining what are reasonable rates to be charged by railroad companies and other corporations, but its determination is subject to review by the courts.[85] A statute which, under the guise of regulating the rates to be charged by a railroad company, operates to deprive the company of its property, is void.[86]

(6) Withdrawal of power to consolidate.—Under the police power of the state, the legislature may prohibit the consolidation or combination of competing railroads, and make the prohibition applicable to existing corporations whose charters confer a general power to consolidate, provided the power so conferred has not been executed; and it can make no difference that the right to alter, amend, or repeal the charters of such corporations has not been reserved.[87]

Co. v. Smith, 173 U. S. 684, reversing 114 Mich. 460.

[85] Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 2 Smith's Cas. 699, 1 Keener's Cas. 253.

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates." Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U. S. 339, 344.

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." Chicago, Milwaukee & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 458.

"If unhampered by contract there is no doubt of the power of the state to provide by legislation for maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that under all the circumstances shall be just to it and to the public, and whether they are not is a judicial question. If the rates are fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of the property of the company without due process of law." Mr. Justice Peckham, in Lake Shore & Michigan Southern Ry. Co. v. Smith, 173 U. S. 684, 687.

[86] See Lake Shore & Michigan Southern Ry. Co v. Smith, 173 U. S. 684, where it was held, reversing 114 Mich. 460, that a particular statute requiring railroad companies to sell one-thousand-mile tickets at a price not exceeding a certain sum, and containing various provisions in regard thereto, constituted a taking of property without due process of law, and did not come within the power of the state to regulate railroad companies and fix maximum rates, so as to prevent extortion and unreasonable charges.

[87] Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677, 1 Keener's Cas. 282.

That the legislature has such power under a reservation of the right to alter, amend, or repeal, see post, § 275(b)(10).

——**(7) Protection of mechanics, material men, laborers and other employes.**—In order to protect laborers, mechanics, and material men, existing corporations may, like natural persons, be made subject to statutes giving a lien on property for work done and materials furnished. It has even been held that a corporation, like a railroad company, for example, may be made liable by statute for the wages of laborers employed by independent contractors engaged in constructing its works.[88] And it has been held that the legislature, under the police power of the state, may protect employes from oppression and fraud by prohibiting the issue, in the payment of wages, of scrip or orders redeemable in goods at exorbitant prices.[89] A statute prohibiting the employment of persons under eighteen years of age and all women laboring in any manufacturing establishment more than sixty hours per week does not impair the obligation of the contract between the state and a manufacturing corporation.[90]

——**(8) Regulation of the business of banks, insurance companies, etc.**—To protect the public against loss by reason of fraud and mismanagement, it is within the police power of the state to regulate the business of savings and other banks, insurance companies, and other corporations of similar character, so far as it may be necessary to do so for the protection of the public. Thus, the state may protect depositors in banks and policy holders in insurance companies by reasonable regulations as to the mode in which such corporations shall invest their deposits or funds.[91]

The state, however, has no power to deprive such corporations of powers conferred upon them by their charter, under the guise of regulating their business, unless the regulation can be sustained as a fair and reasonable police regulation. Thus, it has been

[88] Branin v. Connecticut & Passumpsic Rivers R. Co., 31 Vt. 214.

[89] In re House Bill No. 147, 23 Colo. 504. But see State v. Goodwill, 33 W. Va. 179; Godcharles v. Wigeman, 113 Pa. St. 431.

[90] Com. v. Hamilton Mfg. Co., 120 Mass. 383.

[91] Answer of Justices, 9 Cush. (Mass.) 604.

held that where a banking corporation has been created and vested with authority to receive deposits, lend money, and discount bills and notes, etc., it cannot afterwards be prohibited from transferring bills or notes.[92]

——**(9) Requiring statements of financial condition.**—The police power of the legislature includes the power to pass a law requiring statements of their financial condition to be made to a public officer from time to time by banking companies, insurance companies, and other corporations in whose solvency the general public are interested, and to impose upon them or their officers a penalty for failure to comply with the law.[93]

——**(10) Imposing individual liability on stockholders.**—It has been held that the legislature may pass a law after the creation of a corporation imposing upon its stockholders individual liability for its debts contracted after the passage of the law, and that such a law is not in violation of the constitutional prohibition against laws impairing the obligation of contracts.[94]

——**(11) Taxation.**—The charter of a corporation does not exempt it from the power of the state to collect taxes, unless exemption from taxation has been expressly granted.[95]

§ 273. Reservation of power to alter, amend, or repeal charters.

(a) In general.—In the Dartmouth College Case,[96] Mr. Justice Story suggested that the state might, in granting a charter, reserve the power to amend or repeal the same, and since the decision in that case, this has very generally been done. In the case of special charters the power to amend or repeal has generally been reserved in the charter itself.[97] General laws have also been enacted in most states, if not in all, containing such a

[92] Jemison v. Planters' & Merchants' Bank, 23 Ala. 168.

[93] Eagle Ins. Co. v. Ohio, 153 U. S. 446, 2 Smith's Cas. 704; Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 1 Keener's Cas. 201; Attorney General v. North America Life Ins. Co., 82 N. Y. 172; Chicago Life Ins. Co. v. Auditor, 101 Ill. 82; Ward v. Farwell, 97 Ill. 593.

[94] Stanley v. Stanley, 26 Me. 191; Gray v. Coffin, 9 Cush. (Mass.) 192; Child v. Coffin, 17 Mass. 64. Compare ante, § 271(f).

[95] See post, § 299.

[96] Ante, § 270(a).

[97] A provision in the charter of a corporation that it shall not be altered in any other manner than by an act of the legislature is an

reservation, and they apply to all corporations afterwards organized, unless expressly excepted.[98] In some states the people have not left the matter to the legislature, but have themselves adopted a constitutional provision reserving such power. Such a provision, of course, applies to all corporations afterwards created by the legislature, or organized under legislative authority, whether the legislature has reserved the power to amend or repeal or not.[99]

An enactment by one legislature that all charters granted after its passage may be altered, amended, or repealed at the pleasure of the legislature does not preclude a subsequent legislature from making an inviolable contract with a corporation.[100]

(b) Effect as to existing corporations.— Of course, neither a statute nor a constitutional provision reserving the power to amend or repeal charters can give the power to amend or repeal the charter of a corporation created or organized before its enactment or adoption without the reservation of such power.[101] It

implied reservation by the legislature of the power to amend it. Pennsylvania College Cases, 13 Wall. (U. S.) 190.

Where a charter reserves the power of amendment upon the unanimous petition of the president and directors of the corporation, the condition is substantially complied with where the president and directors unanimously accept an amendment passed without any petition. Rogers v. Nashville, Chattanooga & St. L. Ry. Co. (C. C. A.) 91 Fed. 299.

[98] Such a reservation becomes a term of the charter of corporations afterwards created or organized, without any express reference to the general law. Greenwood v. Union Freight R. Co., 105 U. S. 13, 2 Smith's Cas. 720, 1 Cum. Cas. 538, 1 Keener's Cas. 192; Com. v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555, 1 Cum. Cas. 546; Tomlinson v. Jessup, 15 Wall. (U. S.) 454, 2 Smith's Cas. 740; Thornton v. Marginal Freight Ry. Co., 123 Mass. 32, 1 Cum. Cas. 462; Chincleclamouche Lumber & Boom Co. v. Com., 100 Pa. St. 438; Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. Law, 15; Deposit Bank of Owensboro v. Daviess County (Ky.) 39 S. W. 1030; Macon & Birmingham R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. Rep. 135.

A general law reserving the right to alter, amend, or repeal charters applies to all charters granted by subsequent legislatures unless they are expressly excepted from its effect; and when a charter becomes subject to such provision, it remains subject thereto notwithstanding a subsequent repeal of the provision. Watson Seminary v. Pike County Court, 149 Mo. 57.

[99] State v. Northern Cent. Ry. Co., 44 Md. 131; Matthews v. North Carolina Board of Corporation Com'rs, 97 Fed. 400; Delaware R. Co. v. Thorp, 5 Har. (Del.) 454; Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co. (Del. Ch.) 46 Atl. 12.

[100] New Jersey v. Yard, 95 U. S. 104.

[101] Dodge v. Woolsey, 18 How. (U. S.) 331; New Orleans Gas Co.

must be borne in mind, however, that a charter must be accepted before a corporation comes into existence, and therefore, where the legislature enacts a general law, or the people adopt a constitutional provision, before acceptance of a charter, though after it is offered, reserving the power to repeal, alter, or amend all charters or acts of incorporation, the charter is subject to the reservation.[102]

(c) Effect after consolidation of existing corporations.—When corporations are consolidated, and a new corporation is created as of the time of the consolidation, this new corporation is subject to a statutory or constitutional reservation of the power to amend or repeal charters then in force, though there may have been no such power as to the original corporations.[103]

(d) Effect after amendment of existing charter.—It is clear that if the legislature amends the charter of a corporation, and the amendment is accepted by the corporators, the amended charter is subject to alteration or repeal under a reservation of power contained therein, though the original charter may not have been so.[104]

It has also been held that a constitutional or statutory provision that all charters and grants of or to corporations, or amendments thereof, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent is expressed, applies, not only to subsequent grants of original charters, but also to extensions of pre-existing charters, for, while an extension of a charter merely continues the old corporation by giving it additional life, the giving of additional life to a corporation, beyond the period limited in its charter, is a new grant, and in a sense a new charter.[105]

v Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 1 Keener's Cas. 212; New Orleans Water Works Co. v. Rivers, 115 U. S. 674.

[102] Stone v. Wisconsin, 94 U. S. 181; Attorney General v. Chicago & Northwestern Ry. Co., 35 Wis. 599. See ante, § 44(i).

[103] Shields v. Ohio, 95 U. S. 319; Atlantic & Gulf R. Co. v. Georgia, 98 U. S. 359; post, § 355(g).

[104] Monongahela Nav. Co. v. Coon, 6 Pa. St. 379; Cincinnati, Hamilton & D. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729. See, as to the case last cited, ante, § 57(g).

[105] Northern Bank of Kentucky v. Stone, 88 Fed. 413, 420; Deposit Bank of Owensboro v. Daviess County (Ky.) 39 S. W. 1030, overruling Franklin County Court v.

A statute merely extending the charter of a corporation, without any new conditions except that the extension shall be formally accepted by the corporation, shows no intention that the extended charter shall not be subject to amendment or repeal under such a provision.[106] On the other hand, where an act amending the charter of a gas company, by which it was granted exclusive privileges, provided that no alteration or amendment to the charter of the said company should be made without concurrence of the city council and the directors of the company, it was held that this act "plainly expressed" an intent that the charter should not be subject to amendment or repeal at the mere will of the legislature, but only with the concurrence of the city council and the company's directors.[107]

§ 274. Extent of reserved power to repeal.

When the charter of a corporation, or a general law or constitutional provision, reserves to the legislature the right to alter, amend, or repeal a charter at will or at pleasure, the power to *repeal* is absolute, and the courts cannot inquire into the legislature's motive in exercising it.[108] If the reservation is of the power to repeal on the happening of certain conditions, as, for example, violation of its charter or other default by the corporation, the power to repeal is not absolute, but depends upon the happening of such conditions. When such conditions happen the power is absolute.[109] When the legislature possesses the

Deposit Bank of Frankfort, 87 Ky. 382.

[106] Northern Bank of Kentucky v. Stone, 88 Fed. 413.

[107] Louisville Gas Co. v. Citizens' Gaslight Co., 115 U. S. 683.

[108] Greenwood v. Union Freight R. Co., 105 U. S. 13, 2 Smith's Cas. 720, 1 Keener's Cas. 192, 1 Cum. Cas. 538; Thornton v. Marginal Freight Ry. Co., 123 Mass. 32, 1 Cum. Cas. 462; Com. v. Bonsall, 3 Whart. (Pa.) 559; Read v. Frankfort Bank, 23 Me. 318, 2 Smith's Cas. 707. See Delaware R. Co. v. Thorp, 5 Har. (Del.) 454.

[109] Com. v. Bonsall, 3 Whart. (Pa.) 559; Erie & North East R. Co. v. Casey, 1 Grant's Cas. (Pa.) 274, 26 Pa. St. 287, 2 Smith's Cas. 710; Com. v. Pittsburg & Connellsville R. Co., 58 Pa. St. 26; Flint & Fentonville Plank Road Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; State v. Noyes, 47 Me. 189; Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. Co., 4 Gill & J. (Md.) 122; post, § 304.

As we shall see in another section, there is a difference of opinion as to whether it is within the power of the legislature to determine whether such conditions have arisen, and as to the power of the

power to repeal the charter of a corporation, and exercises it, the courts will not presume that the power was improperly or unconscionably exercised.[110]

§ 275. Extent of reserved power to alter or amend.

(a) In general.—The extent of the power to alter or amend the charter of a corporation, instead of repealing it, under a reservation of the power to alter, amend, or repeal at the pleasure of the legislature, has been the subject of some diversity of opinion.[111] It is settled that the power is not unlimited, but it is very difficult to say what its limits are. The following general rules may be fairly deduced from the decisions:

(1) Such a reservation, at the least, gives the legislature the power to make any alteration or amendment in a charter which will not defeat or substantially impair the object of the grant, or rights of property which have vested under it, and which the legislature may deem necessary to secure either that object or any other public or private rights.[112] The power, it has been said, may be exercised in all cases and to any extent to carry out the original purposes of the incorporation, and to secure the due administration of justice in regard to the rights of the creditors of the corporation and the proper disposition of its assets.[113] It may be exercised by conferring upon a

courts to review its action. See post, § 278.

Under a constitutional provision giving the legislature power to alter or repeal any corporate charter whenever, in its opinion, the privileges granted become injurious to the citizens of the state, the legislature is the sole judge as to whether the privileges granted by a charter have become injurious. Wagner Free Institute v. Philadelphia, 132 Pa. St. 612, 19 Am. St. Rep. 613.

[110] State v. Curran, 12 Ark. 321.

[111] A reservation of the power to repeal a charter includes the power to amend it. Shelby County Judge v. Shelby R. Co., 5 Bush (Ky.) 225.

[112] Commissioners of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 15 Wall. (U. S.) 500; Macon & Birmingham R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. Rep. 135; Leep v. St. Louis, Iron Mountain & S. Ry. Co., 58 Ark. 407, 41 Am. St. Rep. 109. See illustrations, infra, this section, (b), (1-13).

[113] Union Pac. R. Co. v. United States (Sinking-Fund Cases) 99 U. S. 700, 2 Smith's Cas. 777; New York & New England R. Co. v. Town of Bristol, 151 U. S. 556, 1 Keener's Cas. 246, affirming 62 Conn. 527; Miller v. State, 15 Wall. (U. S.) 498; Hyatt v. McMahon, 25 Barb. (N. Y.) 457; Charlotte, Columbia & A. R. Co. v. Gibbes,

corporation additional powers which are merely auxiliary to the object for which the corporation was originally created.[114]

(2) As is stated above, however, the reserved power of the legislature to alter or amend the charter of a corporation is not unlimited, even where the power to alter, amend, or repeal at its will or pleasure is reserved. Such a reservation does not authorize arbitrary and unreasonable amendments.[115] Nor, as we shall see, does it authorize alterations or amendments which will defeat, change, or substantially impair the object of the incorporation, or change its fundamental character.[116] Nor does it authorize alterations or amendments depriving a corporation, or its stockholders or creditors, of vested rights of property without due process of law.[117] "The power of alteration and amendment," said Mr. Justice Swayne in the supreme court of the United States, "is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise

27 S. C. 385; Park v. Modern Woodmen of America, 181 Ill. 214; Read v. Frankfort Bank, 23 Me. 318, 2 Smith's Cas. 707.

[114] Buffalo & New York City R. Co. v. Dudley, 14 N. Y. 336, 2 Smith's Cas. 742; Durfee v. Old Colony & Fall River R. Co., 5 Allen (Mass.) 230, 2 Smith's Cas. 750, 1 Cum. Cas. 773; Agricultural Branch R. Co. v. Winchester, 13 Allen (Mass.) 29; Gifford v. New Jersey Railroad & Transp. Co., 10 N. J. Eq. 171; Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536; Curry v. Scott, 54 Pa. St. 270; Sprigg v. Western Tel. Co., 46 Md. 67; Phinney v. Trustees of Sheppard & Enoch Pratt Hospital, 88 Md. 633; Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; South Bay Meadow Dam Co. v. Gray, 30 Me. 547.

[115] Shields v. Ohio, 95 U. S. 319. And see Leep v. St. Louis, Iron Mountain & S. Ry. Co., 58 Ark. 407, 21 Am. St. Rep. 109.

[116] Shields v. Ohio, 95 U. S. 319; Zabriskie v. Hackensack & New York R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617, 2 Smith's Cas. 760, 1 Cum. Cas. 781; Buffalo & New York City R. Co. v. Dudley, 14 N. Y. 336, 2 Smith's Cas. 742.

See, infra, this section, (b)(14).

Under the reserved power to alter, amend, or repeal the charter of a corporation, the legislature may regulate the corporation's power to contract, when the public good so requires; but it cannot take away the right to contract or impair it to such an extent as to render it ineffectual, and prevent the corporation from accomplishing its objects. Leep v. St. Louis, Iron Mountain & S. Ry. Co., 58 Ark. 407, 41 Am. St. Rep. 109.

[117] Shields v. Ohio, 95 U. S. 319; Com. v. Essex Co., 13 Gray (Mass.) 239, 2 Smith's Cas. 745, 1 Cum. Cas. 550; City of Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140, 2 Smith's Cas. 791, 1 Cum. Cas. 560, 1 Keener's Cas. 186. And see post, § 276.

of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."[118]

(3) The power of the state to amend, alter, or repeal the charter of a corporation at will, reserved by a public law, is not abridged or in any manner affected by executory contracts entered into by a corporation with third persons, or by such persons with subcontractors, for all persons are bound to take notice of the law reserving such power. If such contracts cannot be performed consistently with an alteration in the charter of the corporation, their performance, in so far as thus hindered or obstructed, will be excused under the rule that the performance of contracts is excused when it is rendered impossible by act of the law.*

(4) When the legislature has reserved the power to alter, amend, or repeal the charter of a corporation, it is to be presumed, unless the contrary is made to appear, that an amendment was a proper and valid exercise of the power.[119]

The power of the legislature to authorize a majority of the stockholders of a corporation to bind the minority is considered in treating of the rights of stockholders, in a subsequent chapter.

(b) Particular alterations or amendments—(1) Corporations authorized to maintain a dam in a river or stream.—A water-power company or other corporation, authorized by its charter to construct and maintain a dam across a river or stream in which migratory fish are accustomed to pass, may be required to construct suitable fishways at its own expense, if the power to alter or amend its charter has been reserved,[120] unless a right to maintain fishways as already constructed has become a vested right of property by reason of payment of damages, under leg-

[118] Shields v. Ohio, 95 U. S. 319.

*Macon & Birmingham R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. Rep. 135.

[119] State v. Curran, 12 Ark. 321.

[120] Com. v. Essex Co., 13 Gray (Mass.) 239, 2 Smith's Cas. 745, 1 Cum. Cas. 550; Commissioners of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247.

islative authority, to persons owning rights of fishery.[121] A corporation authorized to construct and maintain a dam across a navigable stream may be required to construct a suitable lock for the passage of vessels.[122]

——(2) **Withdrawal of exclusive privilege or franchise.**—As we have seen in a former section, if the charter of a corporation gives it an exclusive franchise or privilege, the legislature cannot impair such grant by a subsequent grant to another corporation or person, where it has not reserved the power to alter, amend, or repeal the charter.[123] It is otherwise, however, if the power to alter, amend, or repeal the charter has been reserved.[124]

——(3) **Provisions as to officers.**—If the charter of Dartmouth College had reserved the power to alter or amend the same, there can be no doubt that the amendatory acts of the legislature of New Hampshire would have been upheld in so far as they increased the number of trustees, and provided for the appointment of the additional trustees by the executive of the state.[125] Since that decision it has been expressly held that, under such a reservation of power, the legislature might increase the number of trustees of a college in which the state was interested, and require that a majority of them should consist of officers of the state.[126] It has also been held that the charter of a railroad company may be altered, under such a reservation of power, so as to allow a city authorized to subscribe for shares of its stock to appoint a certain number of the directors.[127]

——(4) **Provisions as to stock and stockholders.**—Under a reservation of power to alter or amend the charter of a corporation,

[121] Com. v. Essex Co., 13 Gray (Mass.) 239. See post, § 276.

[122] South Bay Meadow Dam Co. v. Gray, 30 Me. 547.

[123] See ante, § 271(b).

[124] See Perrin v. Oliver, 1 Minn. 202, where it was held that an act incorporating a ferry company, and providing that no other ferry should be established within two miles of the one authorized, might be amended by limiting the exclusive right to a quarter of a mile along the shore, where the charter reserved the right to amend or repeal the same. See, also, the cases cited, ante, § 271 (b).

[125] Ante, §§ 270(a), 271(a).

[126] Jackson v. Walsh, 75 Md. 304. Compare, however, Sage v. Dillard, 15 B. Mon. (Ky.) 341.

[127] New Haven & Derby R. Co. v. Chapman, 38 Conn. 56.

the legislature may authorize an increase or reduction of the amount of its capital stock, provided no vested rights of property are impaired.[128]

Some of the state courts have held that it may change the number of votes or mode of voting at stockholders' meetings, so as to allow cumulative voting,[129] while others have held that such a change impairs vested rights of dissenting stockholders, and is therefore unauthorized.[130] The question, however, has been set at rest by a late decision in the supreme court of the United States, holding that such an amendment is authorized.[131]

Even if it should be held that the exercise of the police power of the state would not give the legislature power to make stockholders of existing corporations individually liable for debts of the corporation subsequently contracted,[132] such power exists under a reservation of the power to alter or amend a charter, and it can make no difference that the articles of association of the corporation expressly declare that the stockholders shall not be so liable.[133]

——**(5) Protection of creditors.**—Such alterations in the charter of a corporation as are reasonably necessary to protect its creditors are within a reservation by the legislature of the power to alter or amend. Thus, it has been held that a railroad company's charter may be so far amended as to require it to provide a sinking fund for the protection of holders of its bonds or other obligations.[134] And as we have seen in another paragraph, in-

[128] Buffalo & New York City R. Co. v. Dudley, 14 N. Y. 336, 2 Smith's Cas. 742; Durfee v. Old Colony & Fall River R. Co., 5 Allen (Mass.) 230, 2 Smith's Cas. 750, 1 Cum. Cas. 773. Compare Zabriskie v. Hackensack & New York R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617, 2 Smith's Cas. 760, 1 Cum. Cas. 781.

[129] Cross v. West Virginia Cent. & Pittsburg Ry. Co., 35 W. Va. 174; Attorney General v. Looker, 111 Mich. 498 (affirmed 179 U. S. 460).

[130] Hays v. Com., 82 Pa. St. 518; Orr v. Bracken County, 81 Ky. 593. In re Election of Directors of Newark Library Ass'n (N. J.) 43 Atl. 435.

[131] Looker v. Maynard, 179 U. S. 46, affirming Attorney General v. Looker, 111 Mich. 498.

[132] Ante, § 272(c)(10).

[133] Sherman v. Smith, 1 Black (U. S.) 587; Gardner v. Hope Ins. Co., 9 R. I. 194, 11 Am. Rep. 238; In re Lee's Bank, 21 N. Y. 9; In re Reciprocity Bank, 22 N. Y. 9; Bailey v. Hollister, 26 N. Y. 112.

[134] Union Pac. R. Co. v. United States (Sinking-Fund Cases), 99 U. S. 700, 2 Smith's Cas. 777.

dividual liability for the future debts of a corporation may be imposed upon the stockholders.[135]

——(6) **Protection of employes.**—Such a reservation also gives the legislature the power to protect the employes of corporations. Thus, it has been held in a late Arkansas case that the legislature may require corporations engaged in operating or constructing a railroad or railroad bridge to pay a servant or employe discharged by them, whether with or without cause, the wages earned at the time of such discharge, without abatement or deduction, and may provide that, if the same be not paid on the day of such discharge, then, as a penalty for such nonpayment, the wages of such servant or employe shall continue at the same rate until paid.[136]

——(7) **Change of name.**—A change in the name of a railroad company or other corporation is authorized under a reservation of power to amend or alter its charter. It does not destroy the identity of the corporation, and therefore does not release subscribers to its capital stock from liability on their subscriptions.[137]

——(8) **Regulation of railroad companies.**—When the legislature has reserved the power to alter, amend, or repeal the charter of a railroad company, it may, for the safety and convenience of the public or the security of property, make different regulations as to the construction and operation of its road than those contained in its charter. Thus, the company may be required to establish stations at other places than were contemplated by its charter, to change the grade of its road, to construct and maintain bridges, gates, or other safeguards at highway crossings, to fence its tracks, or to construct and maintain cattle guards, etc.[138] It has even been held that a railroad com-

[135] Sherman v. Smith, 1 Black (U. S.) 587; supra, this section (4).

[136] Leep v. St. Louis, Iron Mountain & S. Ry. Co., 58 Ark. 407, 21 Am. St. Rep. 109; St. Louis, Iron Mountain & S. Ry. Co. v. Paul, 64 Ark. 83, 62 Am. St. Rep. 154.

[137] Buffalo & New York City R. Co. v. Dudley, 14 N. Y. 336, 2 Smith's Cas. 742.

[138] Com. v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555, 1 Cum. Cas. 546; Fitchburg R. Co. v. Grand Junction Railroad & Depot Co., 4 Allen (Mass.) 198, 205; New

pany authorized to construct and maintain a road to or through a certain city may, for the convenience of the public, be required to join with other railroad companies in establishing a station in the city, and to change its tracks accordingly.[139] The legislature may amend the charter of a railroad company by extending the time limited for the construction of its road,[140] or by authorizing it to unite with another railroad company.[141]

It has been held that a reservation of power to repeal, alter, or amend the charter of a railroad company gives the legislature power to authorize it to extend its road beyond the terminus fixed by its charter, since this is merely a grant of additional powers of the same character as the powers originally granted, and does not change the character of the corporation, or its objects, and that the change, therefore, does not release a dissenting subscriber from liability on his subscription.[142] The soundness of this view, however, may well be doubted, and there are well-considered cases in which it has been held that an amendment of the charter of a railroad company, which authorizes it to materially extend its road beyond the terminus fixed in its charter, or to adopt a materially different route than was contemplated by its charter, is a grant of authority to engage in an enterprise different from that authorized by its charter, and is a substantial change in the objects of the corporation, and therefore not within a reservation of the power to amend.[143]

York & New England R. Co. v. Town of Bristol, 151 U. S. 556, 1 Keener's Cas. 246, affirming 62 Conn. 527; City of Roxbury v. Boston & Providence R. Co., 6 Cush. (Mass.) 424, 432; Albany Northern R. Co. v. Brownell, 24 N. Y. 345.

Indeed, as we have seen, without any reservation of power to alter or amend, such regulations as these might be made in the exercise of the police power of the state. See ante, § 272(c)(4).

Under a reservation of power to alter the special charter of a railroad company, the legislature may render it subject to the general law regulating the liability of railroad companies for stock killed. Jeffersonville R. Co. v. Gabbert, 25 Ind. 431.

[139] City of Worcester v. Norwich & Worcester R. Co., 109 Mass. 103.

[140] See infra, this section (11).

[141] Durfee v. Old Colony & Fall River R. Co., 5 Allen (Mass.) 230, 2 Smith's Cas. 750, 1 Cum. Cas. 773.

[142] Buffalo & New York City R. Co. v. Dudley, 14 N. Y. 336, 2 Smith's Cas. 742. And see Durfee v. Old Colony & Fall River R. Co., 5 Allen (Mass.) 230, 2 Smith's Cas. 750, 1 Cum. Cas. 773.

[143] Zabriskie v. Hackensack &

—(9) Regulation of charges of quasi public corporations.— If the legislature has reserved the power to alter, amend, or repeal the charter of a railroad company, water or gas company, or other corporation engaged in a public employment, it may regulate and limit the rates which they may charge for the carriage of passengers or goods, or for water or gas, etc., provided the limitation is reasonable under all the circumstances; and it can make no difference that the charter of the corporation allows it to fix its own rates.[144] As we have seen, it is held that this power is included in the police power of the state, so that it exists even when there has been no such reservation, provided the charter does not fix the rates or allow the corporation to fix them.[145]

New York R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617, 2 Smith's Cas. 760, 1 Cum. Cas. 781.

In a late Georgia case it was held that when the state has reserved the power by a general law to change, modify, or destroy any corporation at will, and has subsequently granted a charter to a railroad company, giving it the power to build its road where it may deem proper, the state may so amend the charter, after the company has located, but before it has constructed its road, as to confine it to a specified route, on certain conditions as to the construction of the road through a certain county. Macon & Birmingham R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. Rep. 135.

[144] Railroad companies: Shields v. Ohio, 95 U. S. 319; Parker v. Metropolitan R. Co., 109 Mass. 506; Beardsley v. New York, Lake Erie & W. R. Co., 17 Misc. Rep. (N. Y.) 256, 15 App. Div. 251; State v. Consolidation Coal Co., 46 Md. 1; Smith v. Lake Shore & Michigan Southern Ry. Co., 114 Mich. 460, 173 U. S. 684.

Water company: Spring Valley Water Works Co. v. Schottler, 110 U. S. 347.

In the absence of a reservation of power to alter, amend, or repeal, see ante, § 271(c).

An act empowering cities to fix reasonable water rates for the supply of water furnished by any corporation is not unconstitutional as impairing the obligation of the contract between a city and a water company involved in an ordinance by which the city has granted it a franchise, and fixed the rates to be charged, where the corporation was organized under a general law reserving to the legislature the right to regulate the rates at which water shall be furnished to the public. City of Danville v. Danville Water Co., 178 Ill. 299, 180 Ill. 235; Freeport Water Co. v. City of Freeport, 186 Ill. 179.

In Michigan, where the charter of a railroad company, which allowed it to fix its rates of charges, reserved the power to alter, amend, or repeal the same, provided the corporation should be compensated for all damages sustained, it was held that a statute reducing the rate per mile to be charged for a one-thousand-mile ticket, which did not purport to amend the charter, and made no provision for compensating the company for the loss, was not an exercise of the power reserved by the charter. Pingree v. Michigan Cent. R. Co., 118 Mich. 314.

[145] Ante, § 272(c)(5).

——**(10) Withdrawal of power to consolidate.**—Where the charter of a railroad company, or the general law, reserves the right to alter or amend the same, the legislature may take away from the company a general power given by its charter to consolidate with other corporations, so long as the power is unexecuted, to such an extent as to prohibit consolidation with parallel or competing lines.[146] Indeed, as we have seen in another section, it has been held that the legislature has such power under the police power of the state, although it has not reserved the power to alter or amend the charter.[147]

——**(11) Extension of time for completion of works, etc.**—As was stated in a preceding paragraph, the legislature, under the reserved power to amend or alter the charter of a railroad company, may extend the time limited in the charter for the construction of its road.[148] In like manner, it may extend the time limited in the charter of a hotel company for the construction of its hotel.[149]

——**(12) Increase of proportion of profits to be paid charitable institution.**—In a Massachusetts case, where the charter of a mutual life insurance company required it to pay a certain proportion of its profits to a hospital, and reserved to the legislature the power of repeal or amendment, it was held that the legislature could afterwards increase the amount of profits to be paid by changing the measure for determining the amount.[150]

——**(13) Taxation.**—As we shall see in another chapter, reservation of power to alter, amend, or repeal the charter of a corporation includes the power to increase a tax imposed upon the corporation by its charter, or to withdraw a grant of exemption from taxation.[151]

——**(14) Change in character or object of corporation.**—As was

[146] Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 1 Keener's Cas. 264.

[147] See ante, § 272(c)(6).

[148] Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Agricultural Branch R. Co. v. Winchester, 13 Allen (Mass.) 29.

[149] Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536.

[150] Massachusetts General Hospital v. State Mutual Life Assurance Co., 4 Gray (Mass.) 227.

[151] Union Passenger Ry. Co. v. City of Philadelphia, 101 U. S. 528; Tomlinson v. Jessup, 15 Wall. (U.

stated at the beginning of this section, the legislature, under a reservation of the power to alter, amend, or repeal the charter of a corporation at pleasure, has no power to so amend the charter as to change the fundamental character or the object of the corporation. Such power is not included either in the power to amend or alter or in the power to repeal absolutely. "The legislature," said Chancellor Zabriskie in a leading New Jersey case, "can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change." It was further said in substance, in the same case, that the power to alter or modify an act of incorporation contemplates an alteration of something contained in or granted by the act; that any of the franchises granted may be altered, as the right to take land by condemnation, the right to take tolls or fare, or the amount to be taken, etc.; but that the legislature has no right to impose upon the corporation any other duty, or anything involving any other duty, than that attending the business or enterprise for which the corporation was created.[152]

As we have seen in another place, there is a conflict in the decisions on the question whether a reserved power of amend-

S.) 454, 2 Smith's Cas. 740. See post, § 299(b)(3).

[152] Zabriskie v. Hackensack & New York R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617, 2 Smith's Cas. 760, 1 Cum. Cas. 781. See, also, Buffalo & New York City R. Co. v. Dudley, 14 N. Y. 336, 2 Smith's Cas. 742; Shields v. Ohio, 95 U. S. 319; Orr v. Bracken County, 81 Ky. 593; Schenectady & Saratoga Plank-Road Co. v. Thatcher, 11 N. Y. 102; Dow v. Northern Railroad, 67 N. H. 1, 2 Smith's Cas. 795.

ment authorizes an amendment of the charter of a railroad company allowing it to change the route of its road or extend it beyond the terminus fixed by its charter.[153]

§ 276. Impairment of vested rights.

A reservation of the power to alter, amend, or repeal the charter of a corporation gives the legislature no right to take away or impair the vested rights of property of the corporation, without making due compensation. "Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."[154] Nor does it give the legislature the power to impair the vested property rights of the stockholders or creditors of the corporation.[155]

Illustrations of vested rights.—This principle is well illus-

[153] See supra, this section, (8).

[154] Shields v. Ohio, 95 U. S. 319. And see Com. v. Essex Co., 13 Gray (Mass.) 239, 2 Smith's Cas. 745, 1 Cum. Cas. 550; City of Detroit v. Detroit & Howell Plank-Road Co., 43 Mich. 140, 2 Smith's Cas. 791, 1 Keener's Cas. 186, 1 Cum. Cas. 560; Ashuelot R. Co. v. Elliot, 52 N. H. 387, 58 N. H. 451, 2 Smith's Cas. 768; Erie & Northeast R. Co. v. Casey, 1 Grant's Cas. (Pa.) 274, 26 Pa. St. 287, 2 Smith's Cas. 710; Skaneateles Water Works Co. v. Village of Skaneateles, 161 N. Y. 154; Miller v. New York & Erie R. Co., 21 Barb. (N. Y.) 513; Macon & Birmingham R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. Rep. 135; Sage v. Dillard, 15 B. Mon. (Ky.) 341; Rochester & Charlotte Turnpike Road Co. v. Joel, 41 App. Div. (N. Y.) 43.

Where a statute declares that all charters or grants of or to corporations shall be subject to amendment or repeal at the will of the legislature, provided that "whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested," the proviso does not affect the power to repeal the franchise to be a corporation. Griffin v. Kentucky Ins. Co., 3 Bush (Ky.) 592, 96 Am. Dec. 259.

A reservation of the power to alter, amend, or repeal the charter of a railroad company gives the state no power, either by an act of the legislature, or by a constitutional provision, to take the property or franchise of a railroad company for a public use under the power of eminent domain, without making due compensation for everything taken, including the right of way, as well as tangible property. Such a reservation of power does not give power to confiscate property. Opinion of Justices, 66 N. H. 629, 2 Smith's Cas. 803.

The property of a private eleemosynary corporation cannot be turned over by the state to another similar institution. Ohio v. Neff, 52 Ohio St. 375, 2 Smith's Cas. 805.

[155] People v. O'Brien, 45 Hun, 519, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 Smith's Cas. 728, 1 Keener's Cas. 228; Lothrop v. Stedman, 42 Conn. 584; Oldtown & Lincoln R. Co. v. Veazie. 39 Me. 571.

trated by a Massachusetts case. It has been held in that state, as we have seen, that a water-power company, authorized by its charter to construct and maintain a dam across a river or stream in which migratory fish are accustomed to pass, may, under a reservation of power to alter or amend its charter, be required to construct and maintain suitable fishways, unless it has acquired a vested right to maintain fishways as already constructed by it.[156] But where such a corporation had already built fishways, though insufficient ones, and the legislature afterwards, with knowledge that they were insufficient, amended the charter of the corporation by authorizing it to increase its capital stock, upon the express condition that it should be liable for all damages occasioned to the owners of fish rights by the stopping or impeding of the passage of fish by its dam, the damages to be assessed as provided in the act, and the damages were afterwards assessed, and paid by the corporation, it was held that the corporation thereby acquired a vested right to maintain the dam as then constructed, and that the legislature could not afterwards require it to construct and maintain other fishways at its own expense.[157]

It was held in a Michigan case, on the same principle, that a reserved power to amend the charter of a toll-road company did not give the legislature the power to require the company, after it had constructed its road and established a gate at a particular point, to move the gate to another point, and thus deprive it of the right to collect tolls on a part of its road; and that it made no difference that, since the gate had been established, a city had grown up around it.[158]

[156] Commissioners of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247; ante, § 275(b)(1).

[157] Com. v. Essex Co., 13 Gray (Mass.) 239, 2 Smith's Cas. 745, 1 Cum. Cas. 550.

[158] City of Detroit v. Detroit & Howell Plank-Road Co., 43 Mich. 140, 2 Smith's Cas. 791, 1 Keener's Cas. 186, 1 Cum. Cas. 560.

A reservation of the power to alter, amend, or repeal the charter of a turnpike company gives the legislature no right to prohibit it from charging tolls for bicycles, where the right to charge tolls therefor is given by its charter. Rochester & Charlotte Turnpike Road Co. v. Joel, 41 App. Div. (N. Y.) 43.

It has also been held, in accordance with this principle, that the legislature cannot, under such reservation, deprive a railroad company or other corporation of a vested right to redeem its property from a mortgage.[159]

Nor can the legislature, on repealing the charter of a corporation, take away or impair the rights of stockholders and creditors with respect to a distribution of its property.[160] A reservation of the power to repeal the charter of a railroad company gives the legislature the power to repeal the charter and thereby dissolve the corporation, but it gives it no power to deprive the stockholders of the property rights acquired in pursuance of the charter, or to impair the obligation of contracts made by the corporation with a third person under the power conferred by the charter,[161] unless this is expressly provided for in the charter.[162]

The repeal of the charter of a corporation, under a reserved power to repeal, is not invalid as against an existing creditor of a corporation, even though he may have attached the property of the corporation before the repeal, where a receiver is appointed to take charge of and distribute the assets of the corporation, or where the creditor's right to resort to a court of equity for the protection of his rights is not taken away. Such a repeal merely affects the remedy, and neither impairs the obligation of the creditor's contract nor takes away vested rights.[163] In such a case the creditor's remedy is that provided in the repealing statute, or, if no remedy is provided thereby, in equity.[164]

A railroad company's right to take land under the power of eminent domain, so long as it is unexecuted except by filing

[159] Ashuelot R. Co. v. Elliot, 52 N. H. 387, 58 N. H. 451, 2 Smith's Cas. 768.

[160] Lothrop v. Stedman, 42 Conn. 584.

[161] People v. O'Brien, 45 Hun, 519, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 Smith's Cas. 728, 1 Keener's Cas. 228.

[162] See Erie & Northeast R. Co. v. Casey, 1 Grant's Cas. 274, 26 Pa. St. 287, 2 Smith's Cas. 710.

[163] Read v. Frankfort Bank, 23 Me. 318, 2 Smith's Cas. 707.

[164] See the cases above cited. And see post, §§ 326, 328.

a map of a proposed route, is not a vested right, so as to make the condemnation of the land by the state for other purposes operate as an impairment of the obligation of the contract with the railroad company, where the state has reserved the right to amend, alter, or repeal the charter.[165]

§ 277. Conditional reservation of power to alter, amend, or repeal.

(a) In general.—A charter or general law, or a constitutional provision, instead of reserving generally the power to alter, amend, or repeal, may reserve the power to do so on certain conditions, and in such a case the conditions must substantially exist to render an amendment or repeal valid.

Thus, if the legislature reserves the power to repeal the charter of a corporation for violation thereof, there is no power to repeal the charter unless it is violated.[166] If it reserves the right to amend a charter on the unanimous petition of the president and directors, the unanimous consent of the president and directors is necessary.[167] If it provides that the charter of a gas company shall not be amended without the concurrence of the city council and the directors of the company, such concurrence is a condition of the power to amend.[168]

(b) Constitutional requirement of two-thirds vote of legislature.—A constitutional provision requiring two-thirds of the members of the legislature to concur in an act altering or amending a charter does not enter into the contract between the state and a corporation chartered while such provision is in force, so as to prevent the charter from being altered or amended by a mere majority vote, as authorized by a later constitutional provision.[169]

[165] Adirondack Ry. Co. v. New York, 176 U. S. 335, affirming 160 N. Y. 225.

[166] Ante, § 274, and cases there cited.

[167] Under an act of incorporation reserving the right to amend on the unanimous petition of the president and directors, an amendment by a general law is valid without such petition, where the amendment is afterwards accepted by the unanimous vote of the president and directors. Rogers v. Nashville, Chattanooga & St. L. Ry. Co. (C. C. A.) 91 Fed. 299.

[168] Louisville Gas Co. v. Citizens' Gaslight Co., 115 U. S. 683.

[169] In re Reciprocity Bank, 22 N. Y. 9.

§ 278. Exercise of judicial powers by the legislature.

The legislature cannot constitutionally exercise or reserve to itself the power to exercise judicial powers, for such powers are vested by the constitutions in the courts.[170] It has been held, however, that this principle does not prevent the legislature from reserving the power to repeal the charter of a corporation for violation thereof, or for nonuser or misuser of its franchises, or other default by the corporation.[171]

Some of the courts hold broadly that, where there is such a reservation, an inquiry by the legislature into the affairs and defaults of the corporation, for the purpose of determining whether the conditions have arisen upon which its charter may be repealed, is a legislative, and not a judicial, act;[172] and hold, therefore, that the legislature can determine the question, and repeal a charter, without notice to the corporation, and without the judgment of a court, and, further than this, that its determination is not reviewable by the courts.[173]

Other courts, while they hold that the legislature has the power to make such an inquiry and determination, and act upon the same, without notice to the corporation, hold that its action is not final, but may be reviewed by the courts.[174]

Other courts do not take either of these views, but hold that, while the legislature may reserve the power to repeal the charter of a corporation for nonuser or misuser, the determina-

[170] Ashuelot R. Co. v. Elliot, 52 N. H. 387, 58 N. H. 451, 2 Smith's Cas. 768; Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61.

[171] Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Miners' Bank of Dubuque v. United States, 1 G. Greene (Iowa) 553, Morris, 482; and cases cited in the notes following.

[172] Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61.

[173] Miners' Bank of Dubuque v. United States, 1 G. Greene (Iowa) 553, Morris, 482.

[174] Erie & Northeast R. Co. v. Casey, 1 Grant's Cas. (Pa.) 274, 26 Pa. St. 287, 2 Smith's Cas. 710; Com. v. Pittsburgh & Connellsville R. Co., 58 Pa. St. 26.

But the Pennsylvania cases just cited were distinguished in Wagner Free Institute v. Philadelphia, 132 Pa. St. 612, 19 Am. St. Rep. 613, and it was held that, when a constitutional provision gives the legislature power to alter or repeal any corporate charter whenever, in its opinion, the privileges granted become injurious to the citizens of the state, the legislature is the sole judge as to whether privileges granted by a charter have become injurious.

tion of the question whether there has been such nonuser or misuser, so as to give rise to the right to repeal, is a judicial, and not a legislative, function; and, therefore, that the legislature cannot repeal a charter under such a reservation of power without an investigation and judgment by a court, after due notice to the corporation. This view is the better supported by reason and authority.[175]

For the legislature to appoint a receiver or provide for his appointment by an executive officer of the government, to wind up the business of an insolvent corporation, is properly within its power as a legislative act.[176] Under the national banking act, receivers are appointed by the comptroller of the currency to wind up insolvent national banks. A corporation, however, cannot reserve the power to foreclose a mortgage on the property of a corporation, for the foreclosure of a mortgage is a judicial, and not a legislative, act.[177]

§ 279. Acceptance of amendments.

The fact that the legislature has reserved the power to amend the charter of a corporation does not give it the power to compel the corporation to continue business under the amended charter, whether the corporators are willing to do so or not. The corporation is not bound by the amended charter unless it expressly or impliedly accepts the same; but it has no right to continue under its original charter, and, if it does continue its business, it thereby impliedly accepts the amendment, and is bound thereby.[178]

Amendments conferring additional power upon a corporation, as the power of eminent domain, for example, and not

[175] State v. Noyes, 47 Me. 189; Flint & Fentonville Plank-Road Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. Co., 4 Gill & J. (Md.) 122.

[176] Lothrop v. Stedman, 42 Conn. 584; Read v. Frankfort Bank, 23 Me. 318, 2 Smith's Cas. 707; Erie & Northeast R. Co. v. Casey, 1 Grant's Cas. (Pa.) 274, 26 Pa. St. 287, 2 Smith's Cas. 710; Carey v. Giles, 9 Ga. 253.

[177] Ashuelot R. Co. v. Elliot, 52 N. H. 387, 58 N. H. 451, 2 Smith's Cas. 768.

[178] Yeaton v. Bank of Old Dominion, 21 Grat. (Va.) 593, 2 Smith's Cas. 808. And see ante, § 57(e).

changing the object or character of a corporation, may be accepted by the board of directors.[179] Other amendments must be accepted by the stockholders. The power of a majority of the stockholders to bind the minority by acceptance of an amendment is elsewhere considered at length.[180]

§ 280. Effect of repeal of charter.

The repeal of a charter, when the repeal is within the power of the legislature, dissolves the corporation, in the absence of provision to the contrary, and it cannot afterwards exercise any power under its charter; but a court of equity will protect the rights of stockholders and creditors in its property. It was said by Mr. Justice Miller in a leading case in the supreme court of the United States: "One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money. If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by repeal of the law which granted these special rights. Personal and real property acquired by the corporation during its lawful existence, rights of contract or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not de-

[179] Eastern R. Co. v. Boston & Maine Railroad, 111 Mass. 125, 15 Am. Rep. 13; post, chapter xxv.

[180] Post, chapter xxiv.

stroyed by such repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights."[181]

§ 281. Intention to repeal charter.

Even when the legislature has reserved the power to repeal the charter of a corporation, a subsequent statute will not be construed as repealing it, unless such an intention on the part of the legislature is expressed in the statute or necessarily implied. Repeals are not favored, and such a construction should be placed upon statutes, when possible, as to avoid a repeal.[182] The repeal of a general law authorizing the formation of corporations will not be construed as a repeal of the charters of corporations which have been formed under it,[183] unless such an intention on the part of the legislature appears

[181] Greenwood v. Union Freight R. Co., 105 U. S. 13, 2 Smith's Cas. 720, 1 Cum. Cas. 538, 1 Keener's Cas. 192. See, also, People v. O'Brien, 45 Hun, 519, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 Smith's Cas. 728, 1 Keener's Cas. 228; International & Great Northern Ry. Co. v. State, 75 Tex. 356; Read v. Frankfort Bank, 23 Me. 318, 2 Smith's Cas. 707. And see post, § 326 et seq.

[182] Mechanics' & Traders' Bank of Jersey City v. Bridges, 30 N. J. Law, 112; Morris & Essex R. Co. v. Railroad Tax Commissioner, 37 N. J. Law, 228; Bibb v. Hall, 101 Ala. 79; United Hebrew Benevolent Ass'n v. Benshimol, 130 Mass. 325; Donworth v. Coolbaugh, 5 Iowa, 300; Force v. Dahlonega Tanning & Leather Mfg. Co., 22 Ga. 86.

Where the charter of a corporation and a subsequent general statute, which subjected to its regulations, so far as the same were applicable, all corporations theretofore formed, both provided that at all corporate elections each stockholder should be entitled to as many votes as he owned shares, but the charter limited the stockholders to twenty votes each, while there was no limitation in the statute, it was held that the statute did not repeal the charter provision, as it was not applicable thereto. Webb v. Ridgely, 38 Md. 364.

Where a statute does not in express terms annul a right or power given to a corporation by a former act, but merely confers the same rights and powers upon it under a new name, and gives it additional powers, the latter act does not repeal the former. Waring v. City of Mobile, 24 Ala. 701.

[183] United Hebrew Benevolent Ass'n v. Benshimol, 130 Mass. 325; Donworth v. Coolbaugh, 5 Iowa, 300; Bibb v. Hall, 101 Ala. 79.

from the express terms of the repealing statute or by necessary implication.[184]

But if the charter of a corporation is subject to alteration, amendment, or repeal, a subsequent statute, which is applicable to the corporation, impliedly repeals the charter in so far as it is inconsistent therewith.[185] Thus, if a special act incorporating a railroad company, with the exclusive right to construct and operate a road along a certain route, reserves the power to amend or repeal the same, it is repealed, in so far as the exclusive right is concerned, by a subsequent act granting a right of way over the same route to another corporation.[186] And a provision in the charter of an educational corporation, prohibiting the sale of intoxicating liquors within a certain distance of the institution, is repealed by an act giving to the mayor and common council of the city in which the institution is located the power to grant or refuse licenses to sell intoxicating liquors within the city limits.[187]

A special charter may be repealed by a general law without express words declarative of an intent to repeal. Although repeals by implication are not favored, the question is one of legislative intent, and an intent to abrogate the particular enactment in an earlier statute by a general enactment in a later statute is sufficiently manifested where the provisions in the two statutes are so inconsistent that they cannot stand together.[188]

§ 282. Control of corporations created by congress.

(a) Powers of congress.—The United States are not included within the provision of the federal constitution prohibiting any state from passing laws impairing the obligation of contracts, but equally with the states they are prohibited from depriving

[184] Freehold Mutual Loan Ass'n v. Brown, 29 N. J. Eq. 121; Wilson v. Tesson, 12 Ind. 285. See post, § 304.

[185] Morris & Essex R. Co. v. Railroad Tax Commissioner, 37 N. J. Law, 228.

[186] Union Branch R. Co. v. East Tennessee & Georgia R. Co., 14 Ga. 327.

[187] Dingman v. People, 51 Ill. 277.

[188] Morris & Essex R. Co. v. Railroad Tax Commissioner, 37 N. J. Law, 228.

persons or corporations of property without due process of law. The United States cannot, any more than a state, interfere with private rights, whether of natural persons or of corporations, except for legitimate governmental purposes. Congress, after creating a railroad company and granting it land to aid in the construction of its road, cannot pass a law depriving the company of such land except for a public use and upon making compensation. Nor can it by legislation compel a corporation created by it to discharge its obligations, or creditors of the corporation to accept performance of its contracts, otherwise than according to the terms of the contracts, where such contracts have been made in pursuance of powers conferred upon the corporation by its charter. In other words, a charter granted to a corporation by congress is as much a contract as a charter granted to a corporation by a state, and "the United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality, or a citizen."[189]

A private corporation created by congress for public purposes, as a railroad company, for example, is subject to control by congress so far as its business affects the public interests.[190] In creating corporations, congress has expressly reserved the power to alter, amend, or repeal their charters, and under such a reservation of power the same principles apply as in the case of a similar reservation by a state of power over corporations created by it.[191] The question whether congress has the power to repeal or amend the charter of a corporation created by it, where it has not reserved the power to do so, does not seem to have been decided or to have arisen. If it

[189] Per Chief Justice Waite, in Union Pac. R. Co. v. United States (Sinking Fund Cases) 99 U. S. 700, 2 Smith's Cas. 777.

[190] Union Pac. R. Co. v. United States, 99 U. S. 700, 2 Smith's Cas. 777. See, also, Chicago, Burlington & Q. R. Co. v. Iowa, 94 U. S. 155, 2 Smith's Cas. 695.

[191] Union Pac. R. Co. v. United States, 99 U. S. 700, 2 Smith's Cas. 777.

should arise, it is probable that it would be held that the provision in the federal constitution prohibiting congress from depriving any person of property without due process of law, or from taking private property for public use without just compensation, limits the power of congress with respect to repealing or altering charters of corporations to the same extent as the power of the states is limited by the provision against laws impairing the obligation of contracts. This would seem clear when we consider that the charter of a corporation is a contract, and that rights arising under contracts are vested property rights.

(b) Power of the states.—A corporation created by or under an act of congress, since it is a creature of the federal government, is not subject to control by the state legislatures, except in so far as congress has subjected them to state control.[192]

§ 283. Control of territorial corporations.

Congress has the power to alter, amend, or repeal laws passed by a territorial legislature, including laws creating or authorizing the formation of corporations. "Territorial governments occupy towards congress something of the same relation as municipalities—such as city governments—fill towards the state legislatures. A state legislature can repeal the charter of a municipal government, and the ordinances passed under it; so congress can repeal the organic act of a territory, and all territorial enactments, in pursuance of the organic act. Congress is the sovereign power to legislate for the territories, and all charters from territorial legislatures must be held to have been accepted with the knowledge that congress possessed the authority to change or repeal the law creating them."[193]

[192] State v. Curtis, 35 Conn. 374, 95 Am. Dec. 263; McCulloch v. Maryland, 4 Wheat. (U. S.) 316; First Nat. Bank of Louisville v. Com., 9 Wall. (U. S.) 353; Union Pac. R. Co. v. Peniston, 18 Wall. (U. S.) 5; Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29.

[193] United States v. Church of Jesus Christ of Latter Day Saints, 5 Utah, 361.

CHAPTER XVI.

TAXATION OF CORPORATIONS.

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§ 284. In general.—With respect to the taxation of corporations, the following general summary may be given:

(1) Private corporations are subject to the taxing power of the state to the same extent as individuals, except in so far as they may be exempted from taxation by an irrevocable contract between them and the state.

(2) Taxes may be imposed—

(a) Upon the franchises of a corporation.

(b) Upon the capital stock in the hands of the corporation, either at its par value or at its actual value.

(c) Upon the tangible property of the corporation, real and personal.

(d) Upon the shares of the capital stock in the hands of the stockholders. And in such a case, the corporation may be compelled to pay the tax and deduct it from dividends, or otherwise collect it from the stockholders.

(3) In the absence of provision to the contrary, the real property of a corporation is taxable at the place where it is situated, and its personal property, wherever it may be situated, at the residence or domicile of the corporation. This, however, may be changed by statute. Shares of stock in the hands of the stockholders are taxable at the residence or domicile of the holder, in the absence of provision to the contrary; but they may be made taxable at the residence or domicile of the corporation.

(4) The state may compel payment of taxes for years past, if failure to collect the same was due to evasion by the corporation, or negligence or mistake of the tax officers.

(5) In the absence of a constitutional prohibition, double taxation—as in the case of a tax on all the tangible property of a corporation and also upon its capital stock—is not illegal, but a statute will be so construed as to avoid it, if possible. In some jurisdictions double taxation is prohibited by the constitution. There is a conflict of opinion as to whether it is double taxation to impose a tax upon the property or the capital stock of a corporation, and also upon the shares of stock in the hands of the stockholders.

(6) As a rule a state cannot tax persons, natural or artificial, or property, residing or situated beyond its territorial limits. But it may tax a foreign corporation doing business within its limits, and the property of a foreign corporation situated within its limits; and it may tax shares of a domestic corporation held by nonresidents.

(7) Taxes cannot be imposed except for a public purpose.

(8) A state cannot impose unequal taxation, but all taxes must be equal and uniform throughout the state.

(9) The fact that a corporation is engaged in an ultra vires business, or that it is ultra vires for it to hold certain property, cannot be set up to escape taxation thereon.

(10) A state may tax such of the tangible property of a corporation created by congress as is situated within its limits, subject to limitations imposed by congress; but it cannot tax such a corporation in such a way as to interfere with its power to serve the federal government as was intended in its creation. It cannot tax its franchise without the consent of congress.

(11) A state cannot impose a tax upon railroad companies and the like which will amount to a regulation of or interference with interstate or foreign commerce, unless congress consents.

(12) Nor can a state impose a tax, without the consent of congress, in violation of the constitutional prohibition against the laying of any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws.

(13) Nor can it violate the constitutional prohibition against laying any duty of tonnage.

(14) Congress may tax corporations under the power conferred upon it by the constitution "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." But it is provided by the constitution that—

(a) All duties, imposts, and excises shall be uniform throughout the United States.

(b) No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration directed by the constitution to be taken.

(c) No tax or duty shall be laid on articles exported from any state.

(d) No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, and that vessels bound to or from one state shall not be obliged to enter, clear, or pay duties in another.

(15) The constitutional prohibition against a state's depriving any person of property without due process of law protects corporations as well as natural persons, and renders unconstitutional tax laws which deprive them of their property without due process of law. It does not render tax laws invalid, however, merely because they allow the assessment and collection of taxes without providing for judicial proceedings.

(16) With respect to the exemption of corporations from taxation, the following rules are settled:

(a) No private corporation is exempt from the taxing power of the state by which it was created, unless an exemption has been irrevocably granted by the state for a consideration.

(b) In the absence of a constitutional prohibition, a state may, for a consideration, grant to a corporation an entire or partial exemption from taxation, and, if it does so without reservation of power to revoke the exemption, the grant is a contract, within the constitutional prohibition against laws impairing the obligation of contracts, and the state cannot afterwards, in the absence of consent, waiver, or surrender by the corporation, impose a tax in violation of the exemption.

(c) A state can neither grant nor renew an exemption from taxation, if the constitution prohibits such exemptions.

(d) A reservation of the power to alter, amend, or repeal a charter gives the state the power to withdraw or change an exemption from taxation.

(e) In determining whether an exemption from taxation has been granted, and, if so, the extent of the exemption, charter or statutory provisions are to be construed strictly in favor of the state and against the corporation.

(f) To render a grant of exemption from taxation irrevocable, there must have been some consideration therefor.

(g) An exemption from taxation is a personal privilege, and is not transferable without the consent of the state.

(h) An exemption from taxation cannot be set up to defeat a tax by another state than the state by which the exemption was granted.

There can be no doubt whatever that, as a general proposition, private corporations are subject to the taxing power of the state to the same extent as individuals, except in so far as they are exempted from taxation by an irrevocable contract between them and the state. "The taxing power," said Chief Justice Black in a Pennsylvania case, "is an incident of the highest sovereignty. It is an essential part of every independent government. By the constitution, and by the principles which lie at the foundation of every organized society, the state may tax all the persons, natural and artificial, within her borders, and compel them to contribute such part of their property and income as the legislature may think right, to defray the expenses and meet the engagements of the government. The wealth of men who are associated together is not less subject to taxation than if it were owned by individuals. The right is as clear to tax an incorporated company as a mercantile partnership."[1]

When the state grants a charter to a private corporation, without any reference to taxation, it does not, as has sometimes been contended, impliedly agree that it will not afterwards impose taxes upon it, and, therefore, to tax a corporation is not a violation of the prohibition in the federal constitution against laws impairing the obligation of contracts, unless there has been a grant of exemption in express terms or by necessary implication.[2]

[1] Bank of Pennsylvania v. Com., 19 Pa. St. 144, 152. See, also, Providence Bank v. Billings, 4 Pet. (U. S.) 514, 560; North Missouri R. Co. v. Maguire, 20 Wall. (U. S.) 46, 60; Delaware Railroad Tax, 18 Wall. (U. S.) 206.

[2] Providence Bank v. Billings, 4 Pet. (U. S.) 514; Bank of Pennsylvania v. Com., 19 Pa. St. 144; Portland Bank v. Apthorp, 12 Mass. 252; Com. v. Lancaster Savings Bank, 123 Mass. 493; post, § 299(b)(4).

As we shall see more at length in another chapter, a state has the power to tax foreign corporations doing business or owning property within its territorial limits.[3]

§ 285. Construction of tax laws in general.

Laws imposing taxes in general terms, and without expressly mentioning corporations, are to be held applicable to corporations, unless it appears that the legislature did not intend to include them. Corporations have repeatedly been held to be included in the word "persons" in laws relating to taxation,[4] for, as we have seen, they "are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute."[5]

A statute imposing a tax upon a corporation will not be construed literally, if it is susceptible of any other reasonable construction, where a literal construction would enable it to evade taxation, for statutes are always to be construed in accordance with the intention of the legislature, and it is not to be supposed that the legislature intends that taxation shall be evaded.[6] In accordance with this rule, it was held in a Pennsylvania case that, as a literal construction of certain words in an act imposing a tax on dividends of a corporation would place it in the power of the directors of the corporation to declare dividends in such a manner as to escape all taxation, and

[3] Post, chapter XXVI.

[4] See Louisville & Nashville R. Co. v. Com., 1 Bush (Ky.) 250; Western Union Tel. Co. v. City of Richmond, 26 Grat. (Va.) 1; Miller's Ex'r v. Com., 27 Grat. (Va.) 110; National Bank of Commerce v. City of New Bedford, 155 Mass. 313; Worth v. Petersburg R. Co., 89 N. C. 301; Worth v. Seaboard & Roanoke R. Co., 89 N. C. 310; People v. Commissioners of Taxes, 23 N. Y. 242. See, however, Central Pacific R. Co. v. State Board of Equalization, 60 Cal. 35; School Directors v. Carlisle Bank, 8 Watts (Pa.) 289; Appeal of Fox, 112 Pa. St. 337, 351.

In Miller's Ex'r v. Com., 27 Grat. (Va.) 110, last cited, corporations were held to be within a statute imposing a collateral inheritance tax, although not expressly mentioned in the statute.

[5] Per Allen, P., in Baltimore & Ohio R. Co. v. Gallahue's Adm'rs, 12 Grat. (Va.) 655, 663. See ante, §§ 23, 24.

[6] City of Philadelphia v. Ridge Avenue Passenger Ry. Co., 102 Pa. St. 190.

as the act was reasonably susceptible of another construction whereby revenue would be secured, the latter construction should be placed upon it.[7]

There are many other rules in relation to the interpretation of tax laws, but as they are not at all peculiar to statutes taxing corporations, it is neither necessary nor proper to discuss them here.

The rules of construction for the purpose of determining whether a corporation has been granted an exemption from taxation, and, if so, the extent of the exemption, are considered in subsequent sections.[8]

§ 286. Property and rights upon which taxes may be assessed.

(a) In general.—"In corporations," as was pointed out by Chief Justice Waite in the supreme court of the United States, "four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders."[9] Each of these elements of taxable value is an appropriate subject of taxation, except as stated in the sections following.

(b) Taxation of franchises.—That the franchises of a corporation, including the franchise of being a corporation, are a proper subject of taxation, can admit of no doubt, and for the purpose of taxation they may be valued separately from its property.[10] "That a franchise has a value," said Judge Walk-

[7] City of Philadelphia v. Ridge Avenue Passenger Ry. Co., 102 Pa. St. 190.

[8] See post, § 299.

[9] Tennessee v. Whitworth, 117 U. S. 129, 136; Louisville & Nashville R. Co. v. State, 8 Heisk. (Tenn.) 663, 795. See, also, Ottawa Glass Co. v. McCaleb, 81 Ill. 556, 558.

[10] Wilmington, Columbia & A. R. Co. v. Brunswick County Com'rs, 72 N. C. 10; Street Railroad Co. v. Morrow, 87 Tenn. 406; Spring Valley Water Works v. Schottler, 62 Cal. 69; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; Porter v. Rockford, Rock Island & St. L. R. Co., 76 Ill. 561; Com. v. Hamilton Mfg. Co., 12 Allen (Mass.) 298; Central Pacific R. Co. v. State Board of Equalization, 60 Cal. 35, 61; Attorney General v. Bay State Mining Co., 99 Mass. 148; Adams Express Co. v. Kentucky, 166 U. S. 171; New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192; Henderson Bridge Co. v. Com., 99 Ky. 623, 166 U. S. 150.

As to the valuation of franchises

er in an Illinois case, "and that it may be ascertained, is, we think, as clear as that a chose in action has a value that may be estimated. In estimating its value, more facts may have to be considered, as it has no market value. But the very fact that it grants rights, privileges and exemptions, not enjoyed by individuals generally, makes it desirable and gives it value. The length of time the corporation may exist, the business to which it relates, its location, and a variety of other circumstances, all, of course, enter into the value of the privilege, and should be considered in ascertaining its value. But that it has a taxable value, we entertain no doubt."[11]

A tax upon the excess of the market value of the stock of a corporation over the value of its property is a franchise tax.[12]

(c) Tangible property.—The right of a state to tax the tangible property of a corporation, real and personal, is still clearer, provided, of course, it has not granted to the corporation an irrevocable exemption from taxation, and provided it violates no provision of the federal constitution.[13]

Subject to such limitations, a tax may be imposed upon the earnings or receipts of a corporation.[14] A corporation may be required to pay a tax upon dividends declared by it.[15] And it

for the purpose of taxation, see, in addition to the cases above cited, Boston & Lowell R. Co. v. Com., 100 Mass. 399.

[11] Ottawa Glass Co. v. McCaleb, 81 Ill. 556, 559. See, also, Spring Valley Water Works v. Schottler, 62 Cal. 69.

[12] Hamilton Co. v. Massachusetts, 6 Wall. (U. S.) 632.

[13] See Wilmington, Columbia & A. R. Co. v. Brunswick County Com'rs, 72 N. C. 10; Spring Valley Water Works v. Schottler, 62 Cal. 69; Henderson Bridge Co. v. Com., 99 Ky. 623; and many other cases more specifically cited in the notes following.

As to whether a tax assessed against a corporation is a tax upon the corporation itself, or its franchise, or a tax upon its property, see New York v. New York City Tax Com'rs, 2 Black (U. S.) 620; Bank Tax Case, 2 Wall. (U. S.) 200; Delaware Railroad Tax Case, 18 Wall. (U. S.) 206; People v. Commissioners of Taxes, 23 N. Y. 220; Coite v. Society for Savings, 32 Conn. 173; Coite v. Connecticut Mutual Life Ins. Co., 36 Conn. 512; Nichols v. New Haven & Northampton Co., 42 Conn. 103, reviewing cases.

[14] See Delaware Railroad Tax, 18 Wall. (U. S.) 206; Porter v. Rockford, Rock Island & St. L. R. Co., 76 Ill. 561; Chicago, Burlington & Q. R. Co. v. Siders, 88 Ill. 320; State v. Northern Central Ry. Co., 44 Md. 131.

[15] City of Philadelphia v. Ridge Avenue Passenger Ry. Co., 102 Pa. St. 190.

may be taxed upon its undivided profits or surplus.[16] After a dividend is declared in good faith, and not as a mere subterfuge, and the amount of the same is credited to the stockholders, the money is not taxable to the corporation as part of its undivided profits or surplus, and cannot be taken into consideration in valuing the same.[17]

(d) Capital stock in the hands of the corporation, and dividends.—Instead of assessing a tax upon the tangible property of a corporation directly, or in addition thereto, if there is no constitutional prohibition against double taxation,[18] the legislature may impose a tax upon its capital stock.[19]

Properly speaking, the "capital stock" of a corporation is the sum fixed by its charter or articles of incorporation as the amount paid or to be paid in by the stockholders for the prosecution of the business of the corporation, as distinguished from the amount of property owned by it, which may be of greater or less value than the amount of the capital stock;[20] and this construction should be placed upon a statute imposing a tax

[16] Pollard v. First Nat. Bank of Newton, 47 Kan. 406.

[17] Pollard v. First Nat. Bank of Newton, 47 Kan. 406.

[18] See post, § 287.

[19] Delaware Railroad Tax Case, 18 Wall. (U. S.) 206; Whitney v. City of Madison, 23 Ind. 331; Wright v. Stilz, 27 Ind. 338; People v. Coleman, 126 N. Y. 433; State Exchange Bank v. Town of Parkersburg (Iowa) 83 N. W. 793; Com. v. People's Traction Co., 183 Pa. St. 405; Ohio & Mississippi R. Co. v. Weber, 96 Ill. 443; New Orleans & Carrollton R. Co. v. Board of Assessors, 32 La. Ann. 19; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; Porter v. Rockford, Rock Island & St. L. R. Co., 76 Ill. 561; Chicago, Burlington & Q. R. Co. v. Siders, 88 Ill. 320; Com. v. Hamilton Mfg. Co., 12 Allen (Mass.) 298; Attorney General v. Bay State Mining Co., 99 Mass. 148; Com. v. Charlottesville Perpetual Building & Loan Co., 90 Va. 790, 44 Am. St. Rep. 950.

Where a statute requires a corporation to pay a tax upon the shares of its capital stock, irrespective of any dividends or profits payable to shareholders, it is substantially a tax upon the corporation. New Orleans v. Houston, 119 U. S. 265.

The term "stock" in a law imposing a tax upon the stock of a corporation may mean capital stock, or it may mean shares of stock in the hands of the stockholders. The meaning depends upon the intention of the legislature. See Lockwood v. Town of Weston, 61 Conn. 211. See, also, Burr v. Wilcox, 22 N. Y. 551; People v. Commissioners of Taxes and Assessments, 23 N. Y. 192, 220.

The capital stock of a corporation is personal property, notwithstanding the property of the corporation consists of land, and a tax levied thereon is a personal tax. Saup v. Morgan, 108 Ill. 326.

[20] Post, § 375.

upon the "capital stock" of a corporation, unless it appears that the legislature intended the words in a different sense.[21] In using these words, however, in laws relating to taxation, the legislature may intend to tax, not the sum fixed by the charter or articles of association of the corporation as the amount paid or to be paid in by the stockholders, but the property actually owned by the corporation, and, when this intention appears, it must be given effect.[22]

When the capital stock of a corporation is taxed at its actual value, it means that its value must be fixed according to the fact, whether it be above or below par.[23] The market value of the stock may be considered in determining its actual value, but it is not necessarily the actual value.[24] It may be taken as the actual value if there is nothing to show the contrary,[25] but not if the actual value appears in fact to be greater or less.[26]

[21] See New Orleans & Carrollton R. Co. v. Board of Assessors, 32 La. Ann. 19. And compare People v. Coleman, 126 N. Y. 433.

[22] People v. Coleman, 126 N. Y. 433; People v. Wemple, 150 N. Y. 46; Porter v. Rockford, Rock Island & St. L. R. Co., 76 Ill. 561; Ohio & Mississippi R. Co. v. Weber, 96 Ill. 443; Henderson Bridge Co. v. Com., 99 Ky. 623; Security Co. v. Town of Hartford, 61 Conn. 89, 100; State v. Simmons, 70 Miss. 485.

The words "capital stock" in the New York law taxing corporations, and declaring that "the capital stock of every company liable to taxation," save as excepted, "together with its surplus, profits, or reserved funds exceeding ten per cent. of its capital" after making certain deductions, "shall be assessed at its actual value and taxed in the same manner as the other real and personal estate of the county," mean, "not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise, and the chief factor in its safety;" and in taxing corporations under this law, therefore, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus, which should be assessed at its actual value. People v. Coleman, 126 N. Y. 433.

[23] Oswego Starch Factory v. Dolloway, 21 N. Y. 449; People v. Coleman, 126 N. Y. 433; State v. Simmons, 70 Miss. 485; Whitney v. City of Madison, 23 Ind. 331; and others cited in the note preceding.

[24] When a tax is imposed upon the capital stock of corporations, and is to be assessed at its actual value, the value of the capital stock of a corporation is not to be ascertained by multiplying the nominal capital stock by the market value of the shares and then deducting the value of its property which is not taxable. The market value is not necessarily the actual value, but it may be considered in determining the actual value. People v. Coleman, 126 N. Y. 433.

[25] New Orleans & Carrollton R. Co. v. Board of Assessors, 32 La. Ann. 19; Com. v. People's Traction Co., 183 Pa. St. 405.

[26] Com. v. Philadelphia & Reading R. Co., 145 Pa. St. 74 (dis-

In a late Pennsylvania case it was held that, in determining the value of stock for the purpose of taxation, the average selling price of the shares during the tax year should be taken as the basis, and not the average amount paid in by the shareholders on their stock during the year; and that the average selling price is properly ascertained by multiplying the number of shares sold in the open market during the tax year, in each transaction, by the price in such transaction, and dividing the sum of the proceeds of all the sales by the whole number of shares sold; and that, where there have been no sales of shares, and there is no evidence of their value, they should be

tinguishing and explaining Pennsylvania R. Co. v. Com., 94 Pa. St. 474); People v. Coleman, 126 N. Y. 433.

As to the valuation of the capital stock of corporations for the purposes of taxation under the New York statute, see the following cases: People v. Coleman, 126 N. Y. 433; Oswego Starch Factory v. Dolloway, 21 N. Y. 449; People v. Commissioners of Taxes, 23 N. Y. 192; People v. Dolan, 36 N. Y. 59; People v. Ferguson, 38 N. Y. 89; People v. Board of Assessors, 39 N. Y. 81; People v. Commissioners of Taxes, 95 N. Y. 554; People v. Asten, 100 N. Y. 597; People v. Commissioners of Taxes, 104 N. Y. 240; People v. Coleman, 107 N. Y. 541; People v. Commissioners of Taxes, 46 How. Pr. (N. Y.) 315.

Under the New York statute providing for taxation of the capital stock of corporations at its actual value, it was said by the court of appeals: "The law does not prescribe how the actual value of the capital stock of a corporation is to be ascertained. That is left to the judgment of the assessors, and in appraising the actual value they have a right to resort to all the tests and measures of value which men ordinarily adopt for business purposes in estimating and measuring values of property. They may take into account the business of the corporation, its property, the value of its actual assets, the amount and nature of its present and contingent liabilities, the amount of its dividends and the market value of its shares of stock in the hands of individuals. They may resort to any or all of these as to them seems best, and they are not confined to one of them. They may take that test which they think will be most likely to give them the actual value of the stock, and they may disregard all the others. They are not bound to seek for all the evidence which bears upon value; that would be impracticable. The law commits the matter to their judgment and when they have exercised that, it is subject to no review or correction except as prescribed by law."

The court then went on to discuss the various modes of ascertaining the value of the capital stock of a corporation, and held that it had no power to interfere with an assessment where the assessors, instead of taking the market value of the stock, less the statutory exceptions, took as the measure of value the "book value," i. e., estimating all the assets as they appeared on the books of the corporation, and deducting all the liabilities and other matters required by law to be deducted. People v. Coleman, 107 N. Y. 541.

It is erroneous for the assessors, in assessing a corporation under

appraised at the amount paid in on the same. It was further held that where a corporation, during the year, issues additional shares of stock which are of much greater value than par, and allots such shares to the then shareholders in proportion to their holdings at par of the amount paid in, such shares should not enter into the computation.[27]

When a tax is imposed upon the capital stock of a corporation, the whole of its capital stock is subject to the tax, although part of it has not yet been paid in.[28]

In determining the aggregate value of the shares of stock of a corporation, so much of the stock as has not yet been issued is not to be counted, although it has been subscribed for, and a certain percentage of the amount of the subscription has been paid.[29]

A tax upon the capital stock of a corporation may be based upon the amount of dividends that may be declared, or the dividends may themselves be taxed.[30] In such a case payment

such a statute, to take the market value of its shares as the actual value of its capital stock, and base their assessment thereon, when the corporation has presented to them a sworn statement of its assets and liabilities, the truth of which is not questioned, and which shows that there is nothing subject to assessment. It was said, however, that, when the amount of capital and surplus are undisclosed and unknown, the assessors may consider the market value of the share stock, and general condition of the company, not as the thing to be valued and assessed, but as an aid in discovering the value of the capital stock, and that resort may be had to such means of information when the amount of capital and surplus is stated, but the assessors have sufficient reason, founded upon facts established by competent proof, to disbelieve the statement. People v. Coleman, 126 N. Y. 433. In this case, the court distinguished and limited Oswego Starch Factory v. Dolloway, 21 N. Y. 449, and People v. Commissioners of Taxes, 23 N. Y. 192; and distinguished a number of other cases.

The fact that a dividend has recently been declared and paid by a corporation does not necessarily show that there were surplus profits, for the dividend may have been improperly paid, when there were no profits available for the purpose, and therefore the assessors are not justified, from this fact alone, in disbelieving a sworn statement by the officers of the corporation showing that the capital has been impaired. People v. Barker, 141 N. Y. 251; People v. Barker, 139 N. Y. 55.

[27] Com. v. People's Traction Co., 183 Pa. St. 405.

[28] Shelby County Trust Co. v. Board of Trustees of Shelbyville, 91 Ky. 578.

[29] Boston & Albany R. Co. v. Com., 157 Mass. 68.

[30] See Lehigh Crane Iron Co. v. Com., 55 Pa. St. 448; Com. v. Pittsburgh, Ft. Wayne & C. Ry. Co., 74 Pa. St. 83; Com. v. Brush Electric Light Co., 145 Pa. St. 147; City of

of the tax cannot be evaded by the corporation by distributing profits among the stockholders without declaring a dividend.[31] A stock dividend is not within such a statute.[32]

Allegheny v. Federal Street & Pleasant Valley P. Ry. Co., 179 Pa. St. 424; Camden Gas Light Co. v. State, 54 N. J. Law, 135; State v. Franklin Bank of Columbus, 10 Ohio, 91; People v. Home Ins. Co., 92 N. Y. 328.

[31] Lehigh Crane Iron Co. v. Com., 55 Pa. St. 448; Com. v. Pittsburgh, Ft. Wayne & C. Ry. Co., 74 Pa. St. 83; Com. v. Western Land & Improvement Co., 156 Pa. St. 455; City of Allegheny v. Pittsburgh, Allegheny & M. P. R. Co., 179 Pa. St. 414; City of Allegheny v. Federal Street & Pleasant Valley P. Ry. Co., 179 Pa. St. 424.

[32] Where a corporation is required by its charter to pay a tax upon "dividends declared," and discretionary power is given to the directors to declare dividends, the tax can only be levied upon dividends declared by the directors. It cannot be levied upon the par or market value of the stock of the company, or upon profits earned, and from which a dividend might properly be declared. City of Allegheny v. Pittsburgh, Allegheny & M. P. R. Co., 179 Pa. St. 414.

As to what are dividends, and the distinction between dividends and profits, see post, § 516 et seq.

Where a tax is imposed upon dividends, it cannot be evaded by distributing profits among stockholders by means of stock dividends, or by increasing the stock without formally declaring dividends, where the increase represents accumulated profits invested in improvements or otherwise. Lehigh Crane Iron Co. v. Com., 55 Pa. St. 448.

Where a land and improvement company, during a tax year, received from rents and sales of real estate $85,000, being 85 per cent. of the par value of its paid-up stock, and distributed it among its stockholders in proportion to their respective holdings, the capital stock remaining intact after the distribution, it was held that the sums so distributed were clearly dividends. Com. v. Western Land & Improvement Co., 156 Pa. St. 455.

It is enough if a dividend is "made," whether it is formally "declared," or not. Lehigh Crane Iron Co. v. Com., 55 Pa. St. 448; Com. v. Pittsburgh, Ft. Wayne & C. Ry. Co., 74 Pa. St. 83.

If a dividend is declared, the tax is payable on the basis of the declaration; and the company is estopped by the declaration, whether the dividend was in fact earned or not. Com. v. Pittsburgh, Ft. Wayne & C. Ry. Co., 74 Pa. St. 83.

In a statute requiring a corporation to pay an annual tax of a certain per cent. upon so much of "any dividend declared" by it as may exceed a certain per cent. "upon its capital stock," the words "capital stock" mean the capital stock actually paid in, and not the amount of authorized capital stock. City of Philadelphia v. Ridge Avenue Passenger Ry. Co., 102 Pa. St. 190.

The provision in such statute for the payment of a tax annually upon "any dividend declared," etc., contemplates that the tax shall be based upon the aggregate of dividends declared during any year, and not upon any single dividend. A different construction would allow the corporation to evade the tax by declaring, in a single year, a number of dividends, each not exceeding six per cent. on the capital stock, but exceeding such per cent. largely in the aggregate. City of Philadelphia v. Ridge Avenue Passenger Ry. Co., 102 Pa. St. 190.

A nominal or arithmetical increase of its shares by a corporation, without transferring to the

Where a statute taxes, not the capital stock of a corporation, but the shares of stock in the hands of the stockholders, they cannot be taxed against the corporation, instead of the stock-

stockholders anything out of the treasury or property of the corporation, and which is not a cover for distribution of accumulated profits, is not a dividend within the meaning of a statute imposing a tax upon any dividend declared. Com. v. Pittsburgh, Ft. Wayne & C. Ry. Co., 74 Pa. St. 83; City of Allegheny v. Federal Street & Pleasant Valley P. Ry. Co., 179 Pa. St. 424.

Where a railroad company leased its road to another company for 999 years, at twelve per cent. per annum on its capital stock, and the lessor increased the number of its shares 71 per cent. (the par value of both the original and the increased shares being $50), on which the stockholders were to receive a seven per cent. dividend annually, being the same amount they would have received on the original number of shares at twelve per cent., it was held that the increase was not subject to tax as a dividend. Com. v. Pittsburgh, Ft. Wayne & C. Ry. Co., 74 Pa. St. 83.

Where three street railroads agreed to consolidate, the first company's stock being worth five times as much as that of the second company, and ten times as much as that of the third company, and, to obtain a convenient divisor of the consolidated stock, the first company increased its shares, and the new stock was issued in proportion of ten shares for each one of the first company, two for each of the second company, and one for each of the third company, thus preserving the proportionate value of each to the other, it was held that the issue of the increased stock to the stockholders of the first company was not a dividend, within the meaning of a statute imposing a tax on dividends declared. City of Allegheny v. Federal Street & Pleasant Valley P. Ry. Co., 179 Pa. St. 424.

Where a traction company leased the franchises and property of a street railroad company, whose shares were eight times the value of the shares of the traction company, and the stockholders of the street railroad company transferred their stock to the traction company, and received for each share eight shares of the traction company's stock, the stock of the street railroad company becoming an asset of the traction company, and being pledged by it as collateral security for its bonds, it was held that the transaction was merely a change of ownership of property from the street railroad company to the traction company, and neither in form nor in substance the declaration of a dividend, within the meaning of a provision in the street railroad company's charter requiring it to pay a city a tax upon any dividend declared. City of Allegheny v. Pittsburgh, Allegheny & M. P. R. Co., 179 Pa. St. 414.

Where a corporation engaged in manufacturing and leasing sleeping cars set apart as capital a fund accumulated from the rentals of its cars, etc., and subsequently, in good faith, in reduction of its capital stock, paid therefrom to its stockholders twelve dollars per share, reducing the par value of each share by that amount, it was held that the division among the stockholders, being an actual bona fide reduction of capital stock, and neither made, declared, nor returned as a dividend, either of annual profits or of accumulated surplus, did not subject the capital stock of the company to taxation, under the Pennsylvania statute, on the basis of a dividend of twelve dollars per share. Com. v. Central Transportation Co., 145 Pa. St. 89.

Earnings or profits of a corporation fairly devoted to the better-

holders,[33] but the corporation, as we shall see, may be compelled to pay the tax, and deduct it from dividends or collect it from the stockholders.[34]

(e) Shares of stock in the hands of stockholders.—Except as explained in the sections following, the state may impose a tax upon the shares of the capital stock of a corporation in the hands of the individual shareholders.[35] And it is well settled that the corporation may be required to pay such tax and allowed to deduct the amount paid from dividends or otherwise collect it from the shareholders. Such a tax, although in form a tax against the corporation, is in substance a tax against the shareholders only.[36] As we shall see, a tax may be impos-

ment of its plant cannot be considered in any sense as "dividends earned or declared," within the meaning of a statute imposing a tax thereon. Camden Gas Light Co. v. State, 54 N. J. Law, 135.

[33] Conwell v. Town of Connersville, 15 Ind. 150.

[34] See infra, this section, (e), and § 294(c)(4).

[35] Bank of Georgia v. City of Savannah, Dudley (Ga.) 130; Town of St. Albans v. National Car Co., 57 Vt. 68; Street Railroad Co. v. Morrow, 87 Tenn. 406; State v. Travelers' Ins. Co., 70 Conn. 590, 66 Am. St. Rep. 138; Conwell v. Town of Connersville, 15 Ind. 150; Whitney v. City of Madison, 23 Ind. 331; Union Bank v. City of Richmond, 94 Va. 316; Bank of Commerce v. Tennessee, 161 U. S. 134; American Coal Co. v. Allegany County Com'rs, 59 Md. 185; Com. v. Charlottesville Perpetual Building & Loan Co., 90 Va. 790, 44 Am. St. Rep. 950; Greenleaf v. Morgan County Board of Review, 184 Ill. 226, 75 Am. St. Rep. 168.

Whether the term "stock" in a statute imposing a tax upon the stock of a corporation means capital stock, or shares of stock, depends upon the intention of the legislature. It may mean either. See note 19, supra.

[36] Town of St. Albans v. National Car Co., 57 Vt. 68; Street Railroad Co. v. Morrow, 87 Tenn. 406; Union Bank v. City of Richmond, 94 Va. 316; American Coal Co. v. Allegany County Com'rs, 59 Md. 185; State v. Travelers' Ins. Co., 70 Conn. 590, 66 Am. St. Rep. 138; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; State v. Mayhew, 2 Gill (Md.) 487; National Commercial Bank v. City of Mobile, 62 Ala. 284; St. Louis Nat. Bank v. Papin, 4 Dill. 29, Fed. Cas. No. 12,239; Farrington v. Tennessee, 95 U. S. 679.

Compare Conwell v. Town of Connersville, 15 Ind. 150. See post, § 294(c)(4).

It has been held, however, that a statute undertaking to convert corporations into agencies for the collection of taxes laid upon the holders of their bonds, by making the corporation pay the same, is void. Street Railroad Co. v. Morrow, 87 Tenn. 406.

Liability to pay the tax is not affected by insolvency of the corporation. American Casualty Ins. Co.'s Case (Boston & Albany R. Co. v. Mercantile Trust & Deposit Co.) 82 Md. 535.

Mandamus has been held a proper remedy to compel the corporation to pay the tax. Town of St. Albans v. National Car Co., 57 Vt. 68.

Under a tax warrant authorizing the tax collector to levy upon prop-

ed upon shares of a nonresident in a domestic corporation,[37] and upon shares of a resident in a foreign corporation.[38] Where stock is pledged, it is taxable to the pledgor, and not to the pledgee.[39] Under a statute taxing shares of stock, a corporation, it has been held, is taxable on shares of its own stock owned by it.[40]

The shares of stock in national banks are taxable by the states by virtue of an act of congress, subject to certain restrictions imposed by the act.[41]

In taxing shares of stock in the hands of the stockholders, they are to be assessed at their actual value.[42] The market value may be taken as the basis of assessment, unless it appears that the actual value is different.[43] When the shares have been withdrawn from the market, or have no market value, their value may be ascertained from other sources; and, when they have been exchanged for other securities, the value fixed upon them in the exchange is a proper basis for the assessment.[44]

Shares of stock are not "credits," within the meaning of a statute providing that, for the purpose of taxation, taxpayers may deduct their *bona fide* debts from their moneys and credits.[45]

(f) Capital stock invested in nontaxable property.—United States bonds and other securities of the government are not subject to taxation by the states, and therefore, unless it is otherwise provided by congress, the capital stock of a corpora-

erty of the persons named, a collector cannot levy upon the property of a corporation to satisfy a tax against a stockholder on his shares, even though, by contract between the corporation and the stockholder, the corporation is bound to pay the tax. First Nat. Bank of Sandy Hill v. Fancher, 48 N. Y. 524. Compare infra, note 138.

[37] Post, § 289(c).

[38] Post, § 289(c).

[39] Waltham Bank v. Inhabitants of Waltham, 10 Metc. (Mass.) 334; Tucker v. Aiken, 7 N. H. 113.

[40] Richmond & Danville R. Co. v. Allamance County Com'rs, 84 N. C. 504.

[41] Post, § 294(c)(4).

[42] Whitney v. City of Madison, 23 Ind. 331. See supra, this section, (d).

[43] Supra, this section, (d).

[44] Planters' Crescent Oil Co. v. Assessor, 41 La. Ann. 1137. See supra, this section, (d).

[45] Bridgman v. City of Keokuk, 72 Iowa, 42. As to such deductions from the value of national bank shares, see post, § 294(c)(4).

tion is not taxable by a state in so far as it is invested in securities of the United States, for a tax upon the capital stock of a corporation is in effect a tax upon the property in which it is invested.[46] The fact, however, that a corporation has invested its funds in such securities, does not prevent a state from taxing its franchises.[47] And it has been held that a corporation cannot evade taxation by investing its surplus in securities which are not taxable, and that, if it does invest in such securities for such purpose, they may be counted in determining the amount of its assets.[48]

Since shares of stock in the hands of the stockholders are distinct from the capital and capital stock of the corporation, it has been held that they are taxable, although the capital of the corporation is invested in nontaxable securities.[49] This, however, is doubtful.[50]

An act of congress, as we shall see, allows the states to tax shares of stock in national banks, and they may be taxed notwithstanding the capital of the bank is invested in securities of the United States.[51]

——**Patent rights** under the federal laws are not subject to taxation by the states, and a state, therefore, cannot tax the capital stock of a corporation which is invested in and represented by patent rights.[52] This does not apply, however, where the capital stock of a corporation has been issued

[46] Provident Institution v. Massachusetts, 6 Wall. (U. S.) 611, 629; New York v. New York City Tax Com'rs, 2 Black (U. S.) 628; Whitney v. City of Madison, 23 Ind. 331; Wright v. Stilz, 27 Ind. 338; Monroe County Savings Bank v. City of Rochester, 37 N. Y. 365.

[47] Society for Savings v. Coite, 6 Wall. (U. S.) 594; Monroe County Savings Bank v. City of Rochester, 37 N. Y. 365.

[48] City of New Orleans v. New Orleans Canal & Banking Co., 29 La. Ann. 851; State v. Assessor, 37 La. Ann. 850.

[49] Union Bank v. City of Richmond, 94 Va. 316.

[50] See Whitney v. City of Madison, 23 Ind. 331; Wright v. Stilz, 27 Ind. 338.

[51] See post, § 294(c)(4).

[52] Holt v. Indiana Mfg. Co. (C. C. A.) 80 Fed. 1; Com. v. Westinghouse Electric & Mfg. Co., 151 Pa. St. 265; Com. v. Philadelphia Co., 157 Pa. St. 527; Com. v. American Bell Telephone Co., 129 Pa. St. 217; People v. Campbell, 138 N. Y. 543; Marsden Co. v. State Board of Assessors, 61 N. J. Law, 461; People v. Neff, 15 App. Div. (N. Y.) 8; People v. Neff, 19 App. Div. (N. Y.) 599.

But a corporation is not exempt from a franchise tax because its

in payment for the exclusive right to use patented articles within a certain territory, for in such a case it is not invested in a patent right.[53]

——**Exemptions.**—As we shall see in treating of the exemption of property from taxation under a legislative grant, an exemption of all the property of a corporation exempts its capital stock.[54]

§ 287. Double taxation.

(a) Power to impose.—In the absence of a constitutional prohibition, the state may assess taxes upon corporations, or corporations and shareholders, in such a way as to impose double taxation.[55] An intention to do so, however, is never to be presumed, and it is a well-settled rule that a statute will not be so construed as to give it this effect, if any other reasonable construction can be placed upon it.[56] "In cor-

capital stock is invested in patent rights. Marsden Co. v. State Board of Assessors, 61 N. J. Law, 461.

[53] Com v. Central District & Printing Tel. Co., 145 Pa. St. 121, 27 Am. St. Rep. 677; Com. v. Brush Electric Light Co., 145 Pa. St. 147; Com. v. Edison Electric Light Co., 145 Pa. St. 131, 27 Am. St. Rep. 683; Com. v. Philadelphia Co., 145 Pa. St. 142; People v. Campbell, 138 N. Y. 543.

A corporation is taxable on shares in other companies received by it for patent rights transferred by it to the other companies. People v. Campbell, 138 N. Y. 543.

[54] Post, § 299(b)(7).

[55] Tennessee v. Whitworth, 117 U. S. 129; Pittsburgh, Fort Wayne & C. Ry. Co. v. Com., 66 Pa. St. 73, 5 Am. Rep. 344, 349; Cook v. City of Burlington, 59 Iowa, 251, 44 Am. Rep. 679; Ogden v. City of St. Joseph, 90 Mo. 522; Salem Iron Factory Co. v. Inhabitants of Danvers, 10 Mass. 514; Toll Bridge Co. v. Osborn, 35 Conn. 7; Belo v. Forsyth County Com'rs, 82 N. C. 415, 33 Am. Rep. 688; Durham County Com'rs v. Blackwell Durham Tobacco Co., 116 N. C. 441; City of Memphis v. Home Ins. Co., 91 Tenn. 558.

[56] Tennessee v. Whitworth, 117 U. S. 129; Bank of Georgia v. City of Savannah, Dudley (Ga.) 130; Nashua Savings Bank v. City of Nashua, 46 N. H. 389; Salem Iron Factory Co. v. Inhabitants of Danvers, 10 Mass. 514; Republic Life Ins. Co. v. Pollak, 75 Ill. 292; Valle v. Ziegler, 84 Mo. 214; Toll Bridge Co. v. Osborn, 35 Conn. 7; Osborn v. New York & New Haven R. Co., 40 Conn. 491; Ogden v. City of St. Joseph, 90 Mo. 522; Cheshire County Telephone Co. v. State, 63 N. H. 167; Lackawanna County v. First Nat. Bank of Scranton, 94 Pa. St. 221; Com. v. Fall Brook Coal Co., 156 Pa. St. 488; Providence Institution for Savings v. Gardiner, 4 R. I. 484; Lenawee County Savings Bank v. City of Adrian, 66 Mich. 273, 276; Louisville & Evansville Mail Co. v. Barbour, 88 Ky. 73; State v. Simmons, 10 Miss. 485; Boston & Sandwich Glass Co. v. City of Boston, 4 Metc. (Mass.) 181, 186; City of

porations," said Chief Justice Waite in the supreme court of the United States, "four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a state, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed."[57]

In some states double taxation is expressly prohibited by the constitution. A constitutional provision that every person shall "contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property," is a prohibition against double taxation.[58]

(b) What amounts to double taxation.—When it is considered that the doctrine that the property of a corporation belongs in law to the corporation as an entity separate and distinct from its members is a mere fiction of the law, that the beneficial interest is in the stockholders, and that the shares of the capital stock in their hands merely represent such beneficial interest, it seems absurd to say that it is not double taxation to impose a tax upon the property of a cor-

Fall River v. Bristol County Com'rs, 125 Mass. 567; Wright v. Southwestern R. Co., 64 Ga. 783.

[57] Tennessee v. Whitworth, 117 U. S. 129.

In a New Hampshire case it was said: "It is a fundamental principle in taxation that the same property shall not be subject to a double tax, payable by the same party either directly or indirectly, and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes it has been held to follow as a legal conclusion that the legislature could not have intended the same property should be subject to another tax, though there may be general errors in the law, which would seem to imply that it was to be taxed a second time." Nashua Savings Bank v. City of Nashua, 46 N. H. 389, 398.

[58] State v. Sterling, 20 Md. 502, 520; Frederick County Com'rs v. Farmers' & Mechanics' Nat. Bank, 48 Md. 117. See, also, People v. Badlam, 57 Cal. 594; First Nat. Bank v. City of Covington, 103 Fed. 523.

poration, or upon its capital stock, and also impose a tax upon the shares of the capital stock in the hands of the individual stockholders. And some courts have held that it is double taxation.[59] Other courts, including the supreme court of the United States, have taken a different view, and have held that the shares of the capital stock of a corporation in the hands of the stockholders, though representing their interest in the property of the corporation, are, for the purposes of taxation, distinct from the property of the corporation, and from its capital stock in its hands, and that to tax both—the former to the corporation, and the latter to the stockholders—is not double taxation.[60]

[59] Cheshire County Telephone Co. v. State, 63 N. H. 167; Tax Cases, 12 Gill & J. (Md.) 117; City of Baltimore v. Baltimore & Ohio R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; State v. Cumberland & Pennsylvania R. Co., 40 Md. 22, 51; Frederick County Com'rs v. Farmers' & Mechanics' Nat. Bank, 48 Md. 117; Griffith v. Watson, 19 Kan. 23; People v. Badlam, 57 Cal. 594; Spring Valley Water Works v. Schottler, 62 Cal. 69; City and County of San Francisco v. Mackay, 10 Sawy. (U. S.) 431, 21 Fed. 539, 22 Fed. 602; Ogden v. City of St. Joseph, 90 Mo. 522; Smith v. Ramsey, 54 N. J. Law, 546. And see Town of New Haven v. City Bank, 31 Conn. 106; Cook v. City of Burlington, 59 Iowa, 251, 44 Am. Rep. 679; Gordon v. City of Baltimore, 5 Gill (Md.) 231.

"It is unquestionably true that the property of a corporation does not belong to the shareholders; they are not the legal owners, but they have an equitable or beneficial interest therein. It is held and managed for their use and benefit, and under their control and direction. It is not a mere metaphysical subtlety to say that the corporate property is represented by the shares of stock. It is substantially true, for a tax assessed on the property of the corporation is in reality imposed upon the shareholders, and is paid by them indirectly." Per Bartol, C. J., in Frederick County Com'rs v. Farmers' & Mechanics' Nat. Bank, 48 Md. 117, 120.

[60] Van Allen v. Assessors, 3 Wall. (U. S.) 573; Farrington v. Tennessee, 95 U. S. 679; Sturges v. Carter, 114 U. S. 511, 521; City of New Orleans v. Houston, 119 U. S. 265, 277; Com. v. Charlottesville Perpetual Building & Loan Co., 90 Va. 790, 44 Am. St. Rep. 950; Danville Banking & Trust Co. v. Parks, 88 Ill. 170; Porter v. Rockford, Rock Island & St. L. R. Co., 76 Ill. 561; Belo v. Forsyth County Com'rs, 82 N. C. 415, 33 Am. Rep. 688; Durham County Com'rs v. Blackwell Durham Tobacco Co., 116 N. C. 441; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; City of Memphis v. Ensley, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532; Street Railroad Co. v. Morrow, 87 Tenn. 406; City of Memphis v. Home Ins. Co., 91 Tenn. 558; State v. Bank of Commerce, 95 Tenn. 221; Bank of Commerce v. Tennessee, 161 U. S. 134; State Bank of Virginia v. City of Richmond, 79 Va. 113; Greenleaf v. Board of Review of Morgan County, 184 Ill. 226, 75 Am. St. Rep. 168.

In a late Virginia case it was held that a statute taxing the

It is double taxation to tax the deposits in a savings bank both to the bank and to the depositors,[61] or to impose a tax upon all the tangible property of a corporation, and also impose a tax upon its capital stock.[62] But it is not double taxation to impose a tax upon the property or the capital stock or shares of stock of a corporation, and also upon its franchises;[63] or upon the tangible property of a corporation, and also upon the value of its capital stock after deducting the value of its tangible property;[64] or upon bonds issued by a corporation and also upon its franchises.[65]

It is not double taxation to assess as separate items the *roadbed* of a railroad company, which is the foundation upon

"capital including money, credits, or other thing invested," and "the value of all capital of incorporated joint stock companies not otherwise taxed," authorized the taxation of both the capital stock of corporations not otherwise taxed and the shares of stock in such companies held by resident and nonresident holders. Com. v. Charlottesville Perpetual Building & Loan Co., 90 Va. 790, 44 Am. St. Rep. 950.

A statute requiring bank stock to be assessed in the names of the holders at its actual market value is not objectionable as imposing double taxation, although the capital of the bank is largely invested in real estate, which is also taxed. Jefferson County Savings Bank v. Hewitt, 112 Ala. 546.

[61] Berry v. Windham, 59 N. H. 288, 47 Am. Rep. 202; Robinson v. Dover, 59 N. H. 521.

[62] Tennessee v. Whitworth, 117 U. S. 129; Town of New Haven v. City Bank, 31 Conn. 106; Whitney v. City of Madison, 23 Ind. 331; City of Baltimore v. Baltimore & Ohio R. Co., 6 Gill (Md.) 288; Frederick County Com'rs v. Farmers' & Mechanics' Nat. Bank, 48 Md. 117. See, also, Fox's Appeal, 112 Pa. St. 337; Com. v. Standard Oil Co., 101 Pa. St. 119.

"A tax upon a railroad after its completion," said Chief Justice Waite, "is necessarily a tax upon its capital, because, practically, the capital and that into which it has been converted are the same. The railroad of the corporation may be worth more than its capital, but all its capital is in its railroad. Such being the case, the taxation of both railroad and capital would be, so far as the corporation is concerned, double taxation." Tennessee v. Whitworth, 117 U. S. 129, 135.

[63] Delaware Railroad Tax, 18 Wall. (U. S.) 206; Spring Valley Water Works v. Schottler, 62 Cal. 69; United States Electric Power & Light Co. v. State, 79 Md. 63; Manufacturers' Ins. Co. v. Loud, 99 Mass. 146, 96 Am. Dec. 715; Wilmington, Columbia & A. R. Co. v. Brunswick County Com'rs, 72 N. C. 10; Henderson Bridge Co. v. Com., 99 Ky. 623.

[64] Porter v. Rockford, Rock Island & St. L. R. Co., 76 Ill. 561; Chicago, Burlington & Q. R. Co. v. Siders, 88 Ill. 320; Com. v. Lowell Gas Light Co., 12 Allen (Mass.) 75; Com. v. Hamilton Mfg. Co., 12 Allen (Mass.) 298; Hyland v. Central Iron & Steel Co., 129 Ind. 68, distinguishing Hyland v. Brazil Block Coal Co., 128 Ind. 335.

[65] Com. v. New York, Lake Erie & W. R. Co., 150 Pa. St. 234.

which the superstructure rests, the *roadway,* which is the right of way, and the *rails* in place, which constitute the superstructure.[66]

§ 288. Power of municipal corporations.

Since a city or other municipal corporation is a mere creature of the law, with such powers only as are conferred upon it by the law, it has no power to tax shares of stock in a corporation, or the capital stock or property of a corporation located or doing business within its limits, except in so far as the power to do so has been conferred upon it by its charter or some other statute.[67] Before municipal officers, it was said in a Maine case, can rightfully assess a tax upon shares of stock, "they must be authorized so to do by some law of the state. They are the creatures of the state law, and derive their powers, in this respect, solely from state enactment."[68] The legislature, however, subject to constitutional limitations, may confer upon a municipal corporation the power to tax any property within its limits, including the capital stock and property of corporations, and shares of stock in corporations, for municipal purposes.[69]

§ 289. Territorial jurisdiction.

(a) In general.—The political jurisdiction of a state does not extend beyond its territorial limits, and therefore it cannot lawfully impose taxes upon persons, natural or artificial, or upon property, residing or situated beyond such limits.[70] Thus, if the roadbed and other property of a railroad company is situated partly within and partly without a state, the

[66] San Francisco & Northern Pac. R. Co. v. State Board of Equalization, 60 Cal. 12.

[67] City of Macon v. Macon Construction Co., 94 Ga. 201; City of Augusta v. Walton, 37 Ga. 620; City of Richmond v. Daniel, 14 Grat. (Va.) 385; Stetson v. City of Bangor, 56 Me. 274, 288.

[68] Stetson v. City of Bangor, 56 Me. 274, 288.

[69] Gordon v. City of Baltimore, 5 Gill (Md.) 231; Union Bank v. City of Richmond, 94 Va. 316; City of Macon v. Central Railroad & Banking Co., 50 Ga. 620.

[70] State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300; Tap-

state can tax so much only as is within the state. It cannot tax the whole road and equipment, or the entire capital stock of the company.[71]

(b) Bonds and other credits.—The *situs* of a debt for the purpose of taxation is the residence of the creditor,[72] and it has been held, therefore, that a state cannot tax bonds or other evidences of debt of a domestic corporation held by a nonresident, whether a natural person or a corporation, though they may be secured by a mortgage on property of the corporation situated within the state.[73] On the other hand, however, a state may tax a resident on bonds of a railroad company or other corporation secured by a mortgage on property in another state.[74]

pan v Merchants' Nat. Bank of Chicago, 19 Wall. (U. S.) 490, 499; Com. v. Standard Oil Co., 101 Pa. St. 119; Ohio & Mississippi R. Co. v. Weber, 96 Ill. 443.

[71] State Treasurer v. Auditor General, 46 Mich. 224.

The fact, however, that the value of the entire property, both within and without the state, of a railroad company operating a continuous line, is considered in the computation for the purpose of arriving at the value of that part of its property which is within the state, does not render the assessment illegal. Ohio & Mississippi R. Co. v. Weber, 96 Ill. 443. In this case the assessors in Illinois, in assessing taxes against a railroad running through that and other states, found the value of the capital stock and rolling stock of the company by taking the value of the entire capital stock and all the rolling stock everywhere, and set apart so much of the entire value, for taxation in Illinois, as the proportion of the length of its main line in that state bore to the entire line of its road. It was held that this mode of assessment was fair and reasonable, in the absence of any evidence to the contrary, and that it was not an assessment of the property of the company in other states.

Where a corporation was formed under the laws of Illinois by the consolidation of other corporations, one of which was incorporated under the laws of Illinois, and the other of which was incorporated under the laws of another state, it was held that the new or consolidated company was to be considered as incorporated under the laws of Illinois, within the meaning of a tax law, so as to render its capital stock taxable in Illinois. Ohio & Mississippi R. Co. v. Weber, 96 Ill. 443.

[73] State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300; Street Railroad Co. v. Morrow, 87 Tenn. 406; Northern Central Ry. Co. v. Jackson, 7 Wall. (U. S.) 262; Com. v. Chesapeake & Ohio R. Co., 27 Grat. (Va.) 344; City of Davenport v. Mississippi & Missouri R. Co., 12 Iowa, 539.

In Northern Central Ry. Co. v. Jackson, 7 Wall. (U. S.) 262, it was held that a state cannot tax interest on mortgage bonds given by a railroad company and binding every part of its road, both within and without the state, when they are held by a nonresident.

[74] Kirtland v. Hotchkiss, 100 U. S. 491; Mackay v. City & County of San Francisco, 113 Cal. 392; Buck v. Miller, 147 Ind. 586 62

(c) Shares of stock.—A state, as we shall see, may tax shares of the capital stock of a domestic corporation held by a nonresident, for the shares are personal property within the state, and personal property, including shares of stock, may be separated from the person of the owner, and taxed where it is situated, wherever the owner may reside.[75] Under an act of congress, shares of stock in a national bank may be taxed by the state in which the bank is located, although they may be owned by nonresidents.[76] A state may tax shares of a resident in a foreign corporation.[77]

(d) Personal property in transit.—Personal property belonging to a nonresident of a state is not taxable by the state where it is in transit out of or through the state. And where property is collected from one or more points by any means of transportation, and is awaiting the necessary preparation and facilities for further transportation, it is to be deemed in transit, within this rule.[78] Where property is collected, however, even though it may be at the point of final shipment, to await indefinitely the owner's pleasure or the rise of markets, or to undergo a partial process of manufacture, or from any other cause having no relation to the preparation for or facilities or exigencies of transportation, it will be held to have acquired a *situs,* making it subject to taxation.[79]

§ 290. Taxation must be for a public purpose.

It is a well-settled general principle that the state cannot lawfully impose a tax for any other than a public purpose, and of course this principle applies as well to the taxing of cor-

Am. St. Rep. 436. The fact that the bonds are payable in the other states is immaterial. See the cases above cited.

[75] Tappan v. Merchants' Nat. Bank of Chicago, 19 Wall. (U. S.) 491; American Coal Co. v. Allegheny County Com'rs, 59 Md. 185; State v. Travelers' Ins. Co., 70 Conn. 590, 66 Am. St. Rep. 138; Town of St. Albans v. National Car Co., 57 Vt. 68. Compare North Carolina R. Co. v. Allamance County Com'rs, 91 N. C. 454.

[76] See post, § 294(c).

[77] Lockwood v. Town of Weston, 61 Conn. 211; Greenleaf v. Board of Review of Morgan County, 184 Ill. 226, 75 Am. St. Rep. 168. See post, § 293(c).

[78] Standard Oil Co. v. Bachelor, 89 Ind. 1.

[79] Brown County Com'rs v. Standard Oil Co., 103 Ind. 302.

porations as it does to the taxing of individuals. The state can never impose a tax for the purpose of aiding a private enterprise. The fact that an enterprise in aid of which a tax is imposed is of a *quasi* public character, so that the public, or a portion of the public, will be incidentally benefited thereby, does not render the purpose of the tax a public purpose.[80] For example, the state cannot impose taxes (or lawfully authorize a municipality to incur an indebtedness for the payment of which taxation will be necessary) in order to aid the citizens in a particular locality who have suffered losses by reason of a flood, conflagration, or other calamity.[81] Nor can the state authorize a town to issue its bonds in aid of the manufacturing enterprise of individuals, for the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profit of others, and not for a public use, in the proper sense of that term.[82]

§ 291. Unequal taxation.

(a) In general.—In some of the states unequal taxation is expressly prohibited by the constitution, and any law imposing unequal taxation is beyond the power of the legislature and void.* Under a constitutional provision that taxes shall be equal and uniform throughout the state, it has been held

[80] Citizens' Savings & Loan Ass'n of Cleveland v. City of Topeka, 20 Wall. (U. S.) 655; City of Parkersburg v. Brown, 106 U. S. 487; Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39.

[81] Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39. In this case the legislature of Massachusetts had passed a statute empowering the city of Boston to issue bonds for the purpose of raising money to aid the owners of buildings which were burned in the conflagration in that city in 1872, and to lend the money to them on mortgages on the land. It was held that, as taxation would be necessary to pay the bonds, and the purpose was not public, the statute was not within the power of the legislature.

[82] Citizens' Savings & Loan Ass'n of Cleveland v. City of Topeka, 20 Wall. (U. S.) 655; City of Parkersburg v. Brown, 106 U. S. 487.

* A tax on such intangible property of a corporation as cannot be owned by an individual does not violate a constitutional provision that "all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, and all corporate property shall pay the same rate of taxation

that the legislature cannot impose a tax upon the capital stock of some railroad companies, and upon the gross receipts of others.[83] And it has been held that a law imposing a tax upon corporations or persons owning sleeping cars and running them over railroads belonging to others, but exempting owners of such cars running them over their own roads, is in violation of a constitutional provision that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax."[84] A statute providing for raising a fund to pay salaries and current expenses of the state board of railroad commissioners by the taxation of the property of railroad companies only is void under a constitutional provision that "the legislature shall provide for a uniform and equal rate of assessment and taxation."[85]

(b) "Equal protection of the laws."—Aside from provisions in the state constitutions, the provision in the constitution of the United States that no state shall "deny to any person within its jurisdiction the equal protection of the laws,"[86] the word "person," which includes corporations, prevents a state from imposing unequal taxation.[87] Thus, it has been held that this provision prevents a state from assessing taxes against the property of railroad companies and other corporations without deducting the amount of mortgages thereon, while it allows such a deduction in the case of individuals.[88]

paid by individual property." Western Union Tel. Co. v. Norman, 77 Fed. 13.

[83] Worth v. Wilmington & Weldon R. Co., 89 N. C. 291, 45 Am. Rep. 679. See, as to unequal taxation, Chamberlain v. Walter, 60 Fed. 788; Santa Clara County v. Southern Pacific R. Co., 18 Fed. 385, 118 U. S. 394; and cases cited in the notes following.

[84] Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758.

[85] Atchison, Topeka & Santa Fe R. Co. v. Howe, 32 Kan. 737.

[86] Const. U. S. Amend. art. 14, § 1.

[87] Ante, §§ 24, 285; Santa Clara County v. Southern Pacific R. Co., 18 Fed. 385, 118 U. S. 394; Railroad Tax Cases, 13 Fed. 722; Chamberlain v. Walter, 60 Fed. 788; Singer Mfg. Co. v. Wright, 33 Fed. 121.

[88] Railroad Tax Cases, 13 Fed. 722.

The fact that the value of one

(c) Modes of assessment and classification.—Neither the provision in a state constitution that taxes shall be equal and uniform throughout the state, nor the provision in the federal constitution that no state shall deny to any person the equal protection of the laws, prevents a state from adjusting its system of taxation in all proper and reasonable ways. They do not require a state to adopt an iron rule of equal taxation, or prevent it from making a reasonable classification of corporations or property for the purpose of taxation, and providing different modes for assessing different classes of property, if the law operates equally and uniformly throughout the state.[89] It has been held, therefore, that it does not prevent a state from classifying railroad, telegraph, and express companies, and valuing their property (within the state) as a unit for the purpose of taxation.[90] Nor does it prevent a state from imposing an occupation tax upon all corporations and persons engaged in a particular business, as in the business of selling or dealing in sewing machines.[91]

A statute classifying persons and corporations for the purpose of imposing an occupation tax must operate uniformly and equally upon all persons and corporations whose occupation brings them within the particular class. A law, therefore, as was stated at the beginning of this section, is unconstitutional under a provision requiring occupation taxes to be equal and uniform, where it imposes a tax upon the own-

kind of property is to be found, for the purpose of taxation, by one officer or board, and the value of another kind by another, where each is required to ascertain the actual value, does not deny to any person or corporation the equal protection of the laws. San Francisco & Northern Pac. R. Co. v. State Board of Equalization, 60 Cal. 12.

[89] Kentucky Railroad Tax Cases, 115 U. S. 321; Adams Express Co. v. Ohio, 165 U. S. 194.

A statute regulating assessment insurance companies, and exempting them from all provisions of the law relating to premium insurance companies, makes a natural and reasonable classification of insurance companies, and therefore a tax on premium companies alone does not violate a constitutional provision that "taxes shall be uniform upon the same class of subjects." Northwestern Masonic Aid Ass'n v. Waddill, 138 Mo. 628.

[90] Adams Express Co. v. Ohio, 165 U. S. 194, 166 U. S. 185; Adams Express Co. v. Kentucky, 166 U. S. 171.

[91] Singer Mfg. Co. v. Wright, 33 Fed. 121.

ers of sleeping cars running the same over the roads of others, while it exempts owners of the same kind of cars running them over their own roads. "If the things done," said the Texas court in such a case, "constitute in one person or corporation the taxed occupation, no one doing the same things can be omitted from the class taxed, without a violation of the constitutional provision; even though the omitted or excepted person or corporation may do more or other things than are necessary to constitute the taxed occupation, and though that done in excess may, within itself, constitute a distinct occupation subject to taxation, however kindred in nature the occupations may be. The legislature may classify subjects of taxation, and these classifications may, as they will, be more or less arbitrary; but when the classification is made, all must be subjected to the tax imposed, who, by the existence of the facts on which the classification is based, fall within it, unless exempted under some constitutional provision. * * * There is no act or fact entering into the occupation of running such cars as are mentioned in the statute over the road of another, which does not enter into the occupation of the road owner who runs over his own road the same kind of cars for the same uses and purposes, from which the road owner can be withdrawn from the class on which the statute imposes the tax."[92]

In Illinois the constitution, while it declares generally that taxes shall be uniform and equal, expressly provides that a class of persons engaged in special pursuits, including persons and corporations owning franchises and privileges, may be taxed, as the legislature shall determine, by a general law uniform as to the class upon which it operates; and it has been held, therefore, that in that state a tax law is not invalid because it prescribes a rule for the taxation of railroad companies different from that prescribed for individuals.[93]

[92] Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758.

[93] State Railroad Tax Cases, 92 U. S. 575.

(d) Shares of stock held by aliens or nonresidents.—The provision of the federal constitution that no state shall deny to any person within its jurisdiction the equal protection of the laws applies only to persons who are physically present within the jurisdiction of the state the protection of whose laws they invoke; and it has been held, therefore, that it does not prevent a state from imposing a higher tax upon the shares of nonresidents or aliens in a domestic corporation than is imposed upon shares owned by residents.[94]

The act of congress passed under authority of the fourteenth amendment of the federal constitution, and by which it is provided that "all persons within the jurisdiction of the United States shall have the same right in every state * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like * * * taxes, licenses, and exactions of every kind, and to no other,"[95] secures such rights to those persons only who at the time are within the jurisdiction,—that is, within the territory or under the flag of the United States,—and does not affect the right of a state with respect to the taxation of shares in a corporation owned by an alien who is not within the United States. A state has the right to debar aliens from holding shares in her corporations, or to admit them to that privilege only on such terms as she may prescribe, and it has the right, therefore, to tax shares of stock in a domestic corporation at a higher rate than is imposed upon shares owned by residents.[96]

§ 292. Property acquired or business carried on ultra vires—Estoppel to deny corporate existence.

If a corporation acquires property or carries on a business which its charter does not authorize it to acquire or carry on, it cannot set up its violation of its charter to escape liability

[94] State v. Travelers' Ins. Co., 70 Conn. 590, 66 Am. St. Rep. 138.
[95] Rev. St. U. S. § 1977.
[96] State v. Travelers' Ins. Co., 70 Conn. 590, 66 Am. St. Rep. 138.

for the taxes due upon the property or business. It was so held in the supreme court of the United States in a case in which the city of Salt Lake City sought to escape liability for a special tax, under the United States revenue laws, upon spirits distilled by it, and not deposited by it in the bonded warehouse of the United States as required by law. The city was held liable for the tax notwithstanding its engaging in the business of distilling spirits was clearly *ultra vires*.[97]

If an association assumes to act as a corporate body, and acquires property as such, it cannot escape liability for taxes assessed against it on the property by setting up that it had no legal existence as a corporation. It is estopped, in such a case, to deny its corporate existence.*

§ 293. Place of taxation.

(a) In general.—In the absence of provision to the contrary, the real property of a corporation is taxable at the place where it is situated, although the principal office or place of business of the corporation may be elsewhere.[98] But with re-

[97] Salt Lake City v. Hollister, 118 U. S. 256, 1 Keener's Cas. 835, 2 Cum. Cas. 107.

*Atlanta & Richmond Air-Line R. Co. v. State, 63 Ga. 483; ante, 87(e).

[98] Nashua Savings Bank v. City of Nashua, 46 N. H. 389; Carbon Iron Co. v. Carbon County, 39 Pa. St. 251. And see Boston Water Power Co. v. City of Boston, 9 Metc. (Mass.) 199; American Bank v. Mumford, 4 R. I. 478; Providence Institution for Savings v. Gardiner, 4 R. I. 484.

It is competent, however, for the legislature to make the real property of a corporation taxable in the county in which the corporation resides,—that is, the county in which it has its principal office or place of business,—although the property may be located in another county. Salem Iron Factory Co. v. Inhabitants of Danvers, 10 Mass. 514; Goodell Mfg. Co. v. Trask, 11 Pick. (Mass.) 514; Amesbury Nail Factory Co. v. Weed, 17 Mass. 53; Amesbury Woolen & Cotton Mfg. Co. v. Inhabitants of Amesbury, 17 Mass. 461.

The real property of a railroad company is sometimes taxed as an entirety at the place where the company has its principal office, instead of being taxed in each county through which its road runs, and sometimes it is taxed like other real property in each county. See Osborn v. Hartford & New Haven R. Co., 40 Conn. 498; Huntington v. Central Pacific R. Co., 2 Sawy. 503, Fed. Cas. No. 6,911; People v. Placerville & Sacramento Valley R. Co., 34 Cal. 656; People v. McCreery, 34 Cal. 459; Chicago, Burlington & Q. R. Co. v. Paddock, 75 Ill. 616; Sangamon & Morgan R. Co. v. County of Morgan, 14 Ill. 163, 56 Am. Dec. 497; Toledo & Wabash R. Co. v. City of Lafayette, 22 Ind. 262; Applegate v. Ernst, 3

spect to personal property the rule is different. In the absence of provision to the contrary, the *situs* of personal property, for the purpose of taxation, follows the person of the owner, and it is taxable at the place where he resides. This is true of the personal property of a corporation.[99] The residence of a corporation for this purpose, as for other purposes,[100] is in the state by or under whose laws it was created, and, in the absence of provision to the contrary, and generally by express provision, in the county or city in which it has its principal office or place of business.[101]

Bush (Ky.) 648; Orange & Alexandria R. Co. v. City Council of Alexandria, 17 Grat. (Va.) 176.

A railroad company may be taxable in each county through which its road runs, upon the proportion of the whole value of its road which the length of the road in each county bears to the whole length of the road within the state. See State Railroad Tax Cases, 92 U. S. 575; Huck v. Chicago & Alton R. Co., 86 Ill. 352.

[99] Tappan v. Merchants' Nat. Bank of Chicago, 19 Wall. (U. S.) 490; Sangamon & Morgan R. Co. v. County of Morgan, 14 Ill. 163, 56 Am. Dec. 497; People v. Coldwell, 142 Ill. 434; and cases cited infra, note 101.

As to the place of taxation of vessels belonging to corporations, see the note in 56 Am. Dec. 526; Com. v. American Dredging Co., 122 Pa. St. 386, 9 Am. St. Rep. 116; Irvin v. New Orleans, St. Louis & C. R. Co., 94 Ill. 105, 34 Am. Rep. 208; Hays v. Pacific Mail Steamship Co., 17 How. (U. S.) 596; St. Louis v. Wiggins Ferry Co., 11 Wall. (U. S.) 423; Pelton v. Northern Transportation Co., 37 Ohio St. 450; People v. Commissioners of Taxes, 58 N. Y. 242.

In the absence of statutory provision to the contrary, the rolling stock of a railroad company has its situs, for the purposes of taxation, at the residence of the company,—the place where its principal offices are located,—and at no other place. See City of Dubuque v. Illinois Central R. Co., 39 Iowa, 56; Sangamon & Morgan R. Co. v. County of Morgan, 14 Ill. 163, 56 Am. Dec. 497; Appeal Tax Court v. Western Maryland R. Co., 50 Md. 274; Philadelphia, Wilmington & B. R. Co. v. Appeal Tax Court, 50 Md. 397; Appeal Tax Court v. Northern Central Ry. Co., 50 Md. 417; Appeal Tax Court v. Pullman Palace-Car Co., 50 Md. 452; Mohawk & Hudson R. Co. v. Clute, 4 Paige (N. Y.) 384; State v. Severance, 55 Mo. 378; Orange & Alexandria R. Co. v. City Council of Alexandria, 17 Grat. (Va.) 176.

It may be provided, however, that it shall be taxed in each county in proportion to the length of the road within the county. Columbus Southern Ry. Co. v. Wright, 151 U. S. 470; County of Cook v. Chicago, Burlington & Q. R. Co., 35 Ill. 460; State v. Severance, 55 Mo. 378; Richmond & Danville R. Co. v. Allamance County Com'rs, 84 N. C. 504.

[100] Ante, § 122.

[101] State Bank of Virginia v. City of Richmond, 79 Va. 113; People v. McLean, 17 Hun (N. Y.) 204; Western Transportation Co. v. Scheu, 19 N. Y. 408; Milwaukee Steamship Co. v. City of Milwaukee, 83 Wis. 590; Detroit Transportation Co. v. Board of Assessors, 91 Mich. 382; City of Baltimore v. Baltimore City Passenger Ry. Co., 57 Md. 31; Pelton v. Northern Transportation Co., 37

This rule, in so far, at least, as personal property is concerned, applies only where there is no provision to the contrary. It is within the power of a state to separate personal property from the person of the owner for the purpose of taxation, and tax it, like real property, in the place where it is situated.[102] It has been held, therefore, that the rolling stock and other personal property of a railroad company may be distributed, for the purpose of taxation, among the counties of the state through which its line runs, although, in the absence of such a provision, the *situs* of such property for the

Ohio St. 450; Sangamon & Morgan R. Co. v. County of Morgan, 14 Ill. 163, 56 Am. Dec. 497; Peter Cooper's Glue Factory v. McMahon, 15 Abb. N. C. (N. Y.) 314.

Under a statute providing that the personal property of a corporation shall be taxed in the town "in which it has its principal place of business or exercises its corporate powers," the principal place of business of a corporation is the place where the governing power of the corporation is exercised, and not the place where the principal labor of the employes of the corporation is done. Middletown Ferry Co. v. Town of Middletown, 40 Conn. 65.

Under a New York statute declaring that the personal estate of every corporation, liable to assessment on its capital, should be assessed in the town where its principal office or place for transacting its financial concerns might be, or, if it should have no principal office or place for transacting its financial concerns, then in the town where its operations should be carried on, it was held that the location of a manufacturing corporation for the purposes of taxation was the place designated in its certificate of incorporation as the place where its operations were to be carried on, although its treasurer's office was in another town, where part of its books were kept, and its general financial affairs transacted. Oswego Starch Factory v. Dolloway, 21 N. Y. 449. See, also, Western Transportation Co. v. Scheu, 19 N. Y. 408; Chesebrough Mfg. Co. v. Coleman, 44 Hun (N. Y.) 545.

Compare In re McLean, 66 Hun (N. Y.) 122.

As to what is the domicile or residence of a corporation within the state for the purposes of taxation, see, also, ante, § 122.

[102] Tappan v. Merchants' Nat. Bank of Chicago, 19 Wall. (U. S.) 490; Columbus Southern Ry. Co. v. Wright, 151 U. S. 470; State v. Severance, 55 Mo. 378; Mills v. Thornton, 26 Ill. 300, 79 Am. Dec. 377; County of Cook v. Chicago, Burlington & Q. R. Co., 35 Ill. 460; First Nat. Bank of Mendota v. Smith, 65 Ill. 44, 54; Denver & Rio Grande Ry. Co. v. Church, 17 Colo. 1.

Under a Michigan statute, where a lumber company had its principal office in the city of Detroit, but had no yard and paid no taxes there, it was held proper to tax its lumber in a remote township where, by contract with a company which had its mill and storage room there, it was manufactured and piled on the latter's docks, from which, after remaining until it was seasoned, it was taken by purchasers. Manistique Lumbering Co. v. Witter, 58 Mich. 625.

purpose of taxation would be at the place where its principal offices are situated.[103]

Where a corporation, for the purpose of evading taxation, states in its articles of association or certificate of incorporation that its principal place of business is in a certain place, when in reality it is located and does its business in another place, the latter place may be treated as its place of business for the purpose of taxation.[104] Generally, however, the certificate is conclusive on this question.[105]

(b) Franchises.—In the absence of provision to the contrary, the franchise of a corporation, when it is taxed, is taxable in the place where its principal office or place of business is located.[106]

(c) Shares of stock.—Since shares of stock in a corporation in the hands of the individual stockholders are personal property, even when the corporation owns land, their *situs* for the purpose of taxation is the residence of the owners or holders, within or without the state, as the case may be, unless there is express statutory provision to the contrary.[107]

As in the case of other personal property, however, it is within the power of the legislature, if it sees fit, to separate shares from the person of the holder, and tax them, without regard to his residence, in the place where the corporation is located.[108] "Personal property," said Chief Justice Waite, "in the absence of any law to the contrary, follows the person of the

[103] Columbus Southern Ry. Co. v. Wright, 151 U. S. 470. See note 99, infra.

[104] Milwaukee Steamship Co. v. City of Milwaukee, 83 Wis. 590; Detroit Transportation Co. v. Board of Assessors, 91 Mich. 382.

[105] Western Transportation Co. v. Scheu, 19 N. Y. 408; Pelton v. Northern Transportation Co., 37 Ohio St. 450. See ante, § 122.

[106] City of Frankfort v. Stone (Ky.) 58 S. W. 373, denying rehearing, 56 S. W. 679.

[107] McKeen v. County of Northhampton, 49 Pa. St. 519, 88 Am. Dec. 515; Howell v. Village of Cassopolis, 35 Mich. 471; Ogden v. City of St. Joseph, 90 Mo. 522; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Griffith v. Watson, 19 Kan. 23; Conwell v. Town of Connersville, 15 Ind. 150; City of Evansville v. Hall, 14 Ind. 27.

[108] Tappan v. Merchants' Nat. Bank of Chicago, 19 Wall. (U. S.) 490; Danville Banking & Trust Co. v. Parks, 88 Ill. 170; First Nat. Bank of Mendota v. Smith, 65 Ill. 44; Street Railroad Co. v. Morrow, 87 Tenn. 406; Union Bank v. City of Richmond, 94 Va. 316; Williams v. Weaver, 75 N. Y. 30.

owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located."[109]

A state may tax shares in a domestic corporation, owned by nonresidents, at the place where the corporation is located.[110] Resident owners of shares in a foreign corporation may be taxed thereon.[111] And according to the better opinion, this is true notwithstanding the fact that the tangible property of the corporation is taxed in another state,[112] and notwithstanding a constitutional prohibition against double taxation.[113]

(d) Choses in action.—The *situs* of a debt for the purpose of taxation is the place where the holder of the evidence of debt resides, and therefore bonds, notes, or other evidences

[109] Tappan v. Merchants' Nat. Bank of Chicago, 19 Wall. (U. S.) 490, 499.

[110] Tappan v. Merchants' Nat. Bank of Chicago, 19 Wall. (U. S.) 490; State v. Travelers' Ins. Co., 70 Conn. 590, 66 Am. St. Rep. 138; Town of St. Albans v. National Car Co., 57 Vt. 68; Street Railroad Co. v. Morrow, 87 Tenn. 406; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; State v. Mayhew, 2 Gill (Md.) 487; City of Baltimore v. Baltimore City Passenger Ry. Co., 57 Md. 31; American Coal Co. v. Allegany County Com'rs, 59 Md. 185; Bank of Abingdon v. Washington County Sup'rs, 88 Va. 293; Union Bank v. City of Richmond, 94 Va. 316; Com. v. Charlottesville Perpetual Building & Loan Co., 90 Va. 790, 44 Am. St. Rep. 950. Compare Oliver v. Washington Mills, 11 Allen (Mass.) 268.

As we shall see in another section, by express provision of the national banking act shares in a national bank owned by nonresidents not only may but must be taxed, if at all, at the place where the bank is located. Post, § 294-(c)(4).

[111] McKeen v. County of Northampton, 49 Pa. St. 519, 88 Am. Dec. 515; Sturges v. Carter, 114 U. S. 511; City & County of San Francisco v. Fry, 63 Cal. 470; Worthington v. Sebastian, 25 Ohio St. 1; Lockwood v. Town of Weston, 61 Conn. 211; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Lee v. Sturges, 46 Ohio St. 153; Dyer v. Osborne, 11 R. I. 321, 23 Am. Rep. 460; Ogden v. City of St. Joseph, 90 Mo. 522; Seward v. City of Rising Sun, 79 Ind. 351; Porter v. Rockford, Rock Island & St. L. R. Co., 76 Ill. 561, Graham v. Township of St. Joseph, 67 Mich. 652; Worth v. Ashe County Com'rs, 82 N. C. 420, 33 Am. Rep. 692.

[112] Sturges v. Carter, 114 U. S. 511; City & County of San Francisco v. Fry, 63 Cal. 470; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; and other cases in the note preceding.

[113] City & County of San Francisco v. Fry, 63 Cal. 470. But see City & County of San Francisco v. Mackay, 10 Sawy. (U. S.) 431, 21 Fed. 539, 22 Fed. 602.

of debt held by a corporation are taxable where the corporation resides or has its principal place of business, wherever the makers or debtors may reside; and bonds or other evidences of debt of a corporation held by others are taxable where the holders reside; and the fact that the bonds or evidences of debt are secured by a mortgage on land located elsewhere is immaterial.[114] Bonds of a corporation owned by residents of the state are taxable, in the absence of provision to the contrary, at the place where the holders reside.[115]

As we have seen, the holder of bonds or other evidences of indebtedness of a corporation cannot be taxed thereon if he is a nonresident of the state, for this would be taxing property beyond the territorial limits of the state. But a resident of the state may be taxed on bonds of a corporation of another state secured by a mortgage in such other state.[116]

§ 294. Power of state with respect to federal corporations and other agencies of the federal government.

(a) In general.—If a corporation created by congress, or organized under an act of congress, or a state corporation employed as an agency of the federal government, carries on business and owns property within the limits of a state, the state has the power to tax its property to the same extent as it may tax the property of any other corporation or person, except in so far as limitations may be imposed, expressly or impliedly, by the constitution of the United States. Thus, a state may tax the property, within its territorial limits, of a railroad, telegraph, or banking corporation created either by

[114] State Bank of Virginia v. City of Richmond, 79 Va. 113; Street Railroad Co. v. Morrow, 87 Tenn. 406; Mackay v. City & County of San Francisco, 113 Cal. 392; People v. Eastman, 25 Cal. 601; State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300; Northern Central Ry. Co. v. Jackson, 7 Wall. (U. S.) 262; Com. v. Chesapeake & Ohio R. Co., 27 Grat. (Va.) 344; City of Davenport v. Mississippi & Missouri R. Co., 12 Iowa, 539; Kirtland v. Hotchkiss, 100 U. S. 491; Buck v. Miller, 147 Ind. 586, 62 Am. St. Rep. 436.

[115] Street Railroad Co. v. Morrow, 87 Tenn. 406; and other cases in the note preceding.

[116] See ante, § 289(b).

congress or by a state, and employed partly in the service of the federal government.[117]

"That the taxing power of a state," said Mr. Justice Strong in the supreme court of the United States, "is one of its attributes of sovereignty; that it exists independently of the constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court. * * * The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government."[118]

In an earlier case it was said by Chief Justice Chase: "We are not aware of any case in which the real estate, or other property of a corporation not organized under an act of congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common

[117] Union Pacific R. Co. v. Peniston, 18 Wall. (U. S.) 5; First Nat. Bank of Louisville v. Kentucky, 9 Wall. (U. S.) 353; Thomson v. Pacific Railroad, 9 Wall. (U. S.) 587; Western Union Tel. Co. v. City of Richmond, 26 Grat. (Va.) 1; North Ward Nat. Bank v. City of Newark, 39 N. J. Law, 380; Central Pacific R. Co. v. State Board of Equalization, 60 Cal. 35, 61.

Congress has the power to exempt from state taxation corporations created or employed by it as agencies of the federal government. Thomson v. Union Pacific R. Co., 9 Wall. (U. S.) 579; Santa Clara Railroad Tax Case, 9 Sawy. (U. S.) 165, 18 Fed. 385; Northern Pacific R. Co. v. Carland, 5 Mont. 146.

[118] Union Pacific R. Co. v. Peniston, 18 Wall. (U. S.) 5, 29, 30.

benefit, because of the employment of the corporation in the service of the government."[119]

(b) Limitations.—The powers of the federal government conferred upon it by the constitution of the United States, including its power to create corporations as a means of executing a power conferred by that instrument, are superior to the powers of a state, including the power of taxation, where they come into conflict; and it follows that when congress creates a corporation, acting within its constitutional powers, a state cannot impose a tax upon it in such a way as to impair its power to serve the federal government as was intended in its creation. In other words, a state cannot exercise its power to tax a federal corporation in such a way as to burden, embarrass, or interfere with the legitimate operations of the federal government.[120] Clearly, a state cannot impose a tax upon the franchise of a corporation created by congress unless congress consents.[121]

If a telegraph company created by a state accepts the provisions of the act of congress, authorizing the use by telegraph companies of the public domain and the military and post roads, and the crossing of the navigable streams and waters of the United States, and requiring, as a return for such privileges, that the United States shall be given preference in the use of their lines for public business at rates to be fixed by the postmaster general,[122] it becomes an agency of the United States government in so far as its business for such government is concerned, and a state can neither impose a tax upon messages sent over its lines by an officer of the United States,[123] nor impose a license tax upon its business.[124]

[119] Thomson v. Pacific Railroad, 9 Wall. (U. S.) 587.

[120] McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 405-407; Union Pacific R. Co. v. Peniston, 18 Wall. (U. S.) 5; Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29; National Commercial Bank v. City of Mobile, 62 Ala. 284.

[121] California v. Central Pacific R. Co., 127 U. S. 1.

[122] Rev. St. U. S. tit. 65, §§ 5263-5268.

[123] Western Union Tel. Co. v. Texas, 105 U. S. 460; Ratterman v. Western Union Tel. Co., 127 U. S. 411; Western Union Tel. Co. v. Alabama, 132 U. S. 472; Ameri-

The doctrine which exempts the instrumentalities of the federal government from the influence of state legislation is not founded on any express provision of the constitution, but on the implied necessity for the use of such instruments by the federal government. It is limited, therefore, by the principle that state legislation which does not impair the usefulness or capability of such instruments to serve the government is not within the prohibition. For this reason it has been held, as we shall see, that a state law requiring national banks to pay the tax imposed by the state under authority of an act of congress on the shares of its stock, and allowing them to deduct the same from dividends, is valid.[125]

(c) Taxation of national banks and shares therein—(1) In general.—National banks are federal corporations, and are therefore within the rules stated in the preceding paragraphs. A state cannot tax a national bank so as to impede or embarrass it in its operations, except with the consent of congress.[126] Congress has declared in the national banking act as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where

can Union Tel. Co. v. Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90.

[124] Leloup v. Port of Mobile, 127 U. S. 640. Compare Western Union Tel. Co. v. City of Richmond, 26 Grat. (Va.) 1.

[125] First Nat. Bank of Louisville v. Kentucky, 9 Wall. (U. S.) 353; post, § 294(c)(4).

[126] Van Allen v. Assessors, 3 Wall. (U. S.) 573; Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29; New York v. Weaver, 100 U. S. 539; and cases cited in the notes following.

the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."[127]

This provision fixes and limits the power of the states with respect to the taxation of the property of national banks and the shares therein.[128] Neither a state nor a municipal corporation can impose a license tax upon a national bank, for there is no provision therefor in the act of congress.[129] Nor can a state tax the personal property of a national bank.[130] It

[127] Rev. St. U. S. § 5219.

[128] New York v. Weaver, 100 U. S. 539; St. Louis Nat. Bank v. Papin, 4 Dill. 29, Fed. Cas. No. 12,239; First Nat. Bank of Omaha v. Douglas County, 3 Dill. 298, Fed. Cas. No. 4,809; First Nat. Bank v. City of Covington, 103 Fed. 523; Flint v. Board of Aldermen of Boston, 99 Mass. 141, 96 Am. Dec. 713; National Commercial Bank v. City of Mobile, 62 Ala. 284, 34 Am. Rep. 15; Pollard v. State, 65 Ala. 628; Maguire v. Mobile County Board of Revenue, 71 Ala. 401; McHenry v. Downer, 116 Cal. 20; First Nat. Bank v. Township of St. Joseph, 46 Mich. 526; City of Carthage v. First Nat. Bank, 71 Mo. 508, 36 Am. Rep. 494; City of Macon v. First Nat. Bank, 59 Ga. 648; Rosenblatt v. Johnston, 104 U. S. 462; People v. National Bank of D. O. Mills & Co., 123 Cal. 53, 69 Am. St. Rep. 32; Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29; Rich v. Packard Nat. Bank, 138 Mass. 527; City of Pittsburg v. First Nat. Bank, 55 Pa. St. 45.

[129] City of Macon v. First Nat. Bank, 59 Ga. 648.

[130] Rosenblatt v. Johnston, 104 U. S. 462; Covington City Nat. Bank v. City of Covington, 21 Fed. 489; People v. National Bank of D. O. Mills & Co., 123 Cal. 53, 69 Am. St. Rep. 32; First Nat. Bank of Billings v. Province, 20 Mont. 374; North Ward Nat. Bank v. City of Newark, 39 N. J. Law, 380; State v. First Nat. Bank, 4 Nev. 349; Woodward v. Ellsworth, 4 Colo. 580; National State Bank of Oskaloosa v. Young, 25 Iowa, 311; First Nat. Bank of Winnemucca v. Kreig, 21 Nev. 404.

Deposits in a national bank, whether general or special, are assessable for taxation against the depositors, but not against the bank. People v. National Bank of D. O. Mills & Co., 123 Cal. 53, 69 Am. St. Rep. 32.

A national bank cannot be taxed upon its office furniture and cash (National State Bank of Oskaloosa v. Young, 25 Iowa, 311), nor upon its notes, bills, bonds, etc. (State v. First Nat. Bank, 4 Nev. 349; North Ward Nat. Bank v. City of Newark, 39 N. J. Law, 380), nor upon mortgages held by it (First Nat. Bank of Winnemucca v. Kreig, 21 Nev. 404).

It has been held in New Hampshire that the surplus or undivided profits of a national bank may be taxed by the state, if the shares of stock therein are taxed to the stockholders at their par value, instead of their actual value. First Nat. Bank v. Peterborough, 56 N. H. 38, 22 Am. Rep. 416. And see Strafford Nat. Bank v. Dover, 58 N. H. 316.

This, however, seems clearly in conflict with Rosenblatt v. Johnston, 104 U. S. 462.

Such a tax certainly cannot be imposed upon the bank when the

cannot tax the personal property and assets of such an association when the association is insolvent, and its assets are in the hands of a receiver, any more than it can tax such property in the hands of the association itself, for "such property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law."[131]

—**The territories** are not in express terms included in the section of the act of congress allowing the taxation of the real property of national banks and shares of stock therein; but it has been held, in view of other provisions of the national banking act, that they are impliedly included, and that they have the same power in this respect as the states.[132]

—**(2) Real property.**—It will be noticed that this provision allows a state to assess the real property of a national bank for state, county, and municipal taxes; but such taxes can be imposed only "to the same extent, according to its value, as other real property is taxed."*

—**(3) Capital stock.**—There is nothing in the act allowing a state to tax the shares of stock in a national bank in gross, or the capital stock, against the corporation, and such a tax, therefore, is illegal.[133]

shares are taxed to the stockholders at their actual or market value. Covington City Nat. Bank v. City of Covington, 21 Fed. 484.

[131] Rosenblatt v. Johnston, 104 U. S. 462.

[132] Talbott v. Silver Bow County, 139 U. S. 438; People v. Moore, 1 Idaho, 504; Silver Bow County Com'rs v. Davis, 6 Mont. 306.

*Bradley v. Illinois, 4 Wall. (U. S.) 459; National Commercial Bank v. City of Mobile, 62 Ala. 284, 34 Am. Rep. 15; St. Louis Nat. Bank v. Papin, 4 Dill. 29, Fed. Cas. No. 12,239; First Nat. Bank of Omaha v. Douglas County, 3 Dill. 398, Fed. Cas. No. 4,809; First Nat. Bank of Mendota v. Smith, 65 Ill. 44; Miller v. First Nat. Bank of Cincinnati, 46 Ohio St. 424; First Nat. Bank of Leoti v. Fisher, 45 Kan. 726; Collins v. City of Chicago, 4 Biss. 472, Fed. Cas. No. 3,011; City of Macon v. First Nat. Bank, 59 Ga. 648; First Nat. Bank v. City of Richmond, 39 Fed. 309; Sumter County v. National Bank of Gainesville, 62 Ala. 464, 34 Am. Rep. 30; Smith v. First Nat. Bank of Tecumseh, 17 Mich. 479; Brown v. French, 80 Fed. 166.

[133] As to the taxation of the real property of national banks, see Second Nat. Bank of Titusville v. Caldwell, 13 Fed. 429; Covington City Nat. Bank v. City of Covington, 21 Fed. 484; National Commercial Bank v. City of Mobile, 62 Ala. 284, 34 Am. Rep. 15; Loftin v. Citizens' Nat. Bank, 85 Ind. 341;

——(4) **Shares of stock—(aa) In general.**—The statute also allows a state in which a national bank is located, in assessing taxes, to include "all the shares" of its stock "in the valuation of the personal property of the owner or holder." Under this statute, shares in a national bank owned by another national bank may be taxed.[134] The fact that the state has taxed the property of a national bank to the bank does not prevent it from taxing the shares of its stock to the holders.[135] And the fact that part or all of the capital of a national bank is invested in United States government bonds (which are not taxable) does not prevent a state from taxing the whole interest of the holder of shares of stock therein, without any deduction on account of the bonds so held.[136]

——(bb) **Mode and place of taxation.**—The statute also provides that the legislature of each state, subject to the restrictions hereafter referred to, "may determine and direct the manner and place of taxing all the shares of national banking associations located within the state." This gives the legislature the power to provide that shares shall be valued for

National State Bank of Oskaloosa v. Young, 25 Iowa, 311; State v. First Nat. Bank, 4 Nev. 348; Rosenberg v. Weekes, 67 Tex. 578.

That it is a violation of a prohibition against double taxation to tax the real property of a national bank when its stock is taxed to the holders, see Board of Rice County Com'rs v. Citizens' Nat. Bank of Faribault, 23 Minn. 280; Frederick County Com'rs v. Farmers' Nat. Bank, 48 Md. 117. And see County of Lackawanna v. First Nat. Bank of Scranton, 94 Pa. St. 221.

Compare, however, Cook v. City of Burlington, 59 Iowa, 251, 44 Am. Rep. 679. And see ante, § 287.

[134] Bank of Redemption v. Boston, 125 U. S. 60.

[135] See Cook v. City of Burlington, 59 Iowa, 251, 44 Am. Rep. 679. And see ante, § 287. Compare note 133 supra.

[136] Van Allen v. Assessors, 3 Wall. (U. S.) 573; Bradley v. Illinois, 4 Wall. (U. S.) 459, 462; New York v. Commissioners of Taxes, 4 Wall. (U. S.) 244; First Nat. Bank of Louisville v. Kentucky, 9 Wall. (U. S.) 353, 359; Lionberger v. Rouse, 9 Wall. (U. S.) 468; Tennessee v. Whitworth, 117 U. S. 129, 139; Wright v. Stiz, 27 Ind. 338; Williams v. Weaver, 75 N. Y. 30; Home Ins. Co. v. Board of Assessors, 42 La. Ann. 1131; Parker v. Sun Ins. Co., 42 La. Ann. 1172; First Nat. Bank of Shreveport v. Board of Reviewers, 41 La. Ann. 181; People v. Bradley, 39 Ill. 130; Frazer v. Siebern, 16 Ohio St. 615; City of Utica v. Churchill, 33 N. Y. 161; People v. Commissioners of Taxes, 35 N. Y. 423; Hubbard v. Johnson County Sup'rs, 23 Iowa, 130.

Contra, Fox v. Haight, 31 N. J. Law, 399; Jewell v. Hart, 31 N. J. Law, 434; Matheson v. Boyd, 32 N. J. Law, 273; and dictum in Hubbard v. Johnson County Sup'rs, 23 Iowa, 130.

the purpose of taxation at their actual value, although it may exceed the par value.[137]

The state may require the tax on the shares, whether of residents or nonresidents, to be paid by the bank, and allow it to collect the same from the shareholders or deduct it from dividends. This does not impose a tax on the bank as distinguished from the shareholders.[138]

The statute expressly allows all the shares of stock in a national bank to be taxed by the state in which the bank is located, but requires shares owned by nonresidents to be "in the city or town where the bank is located, and not elsewhere," and thus not only prohibits the taxation of nonresident stockholders by the state in which the bank is located at any other

[137] Hepburn v. School Directors, 23 Wall. (U. S.) 480; New York v. Commissioners of Taxes, 94 U. S. 415.

[138] First Nat. Bank of Louisville v. Kentucky, 9 Wall. (U. S.) 353; Merchants' & Manufacturers' Bank v. Pennsylvania, 167 U. S. 461; National Commercial Bank v. City of Mobile, 62 Ala. 284, 34 Am. Rep. 15; Aberdeen Bank v. Chehalis County, 166 U. S. 440; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; Van Slyke v. Wisconsin, 154 U. S. 581; Whitney Nat. Bank v. Parker, 41 Fed. 402; Com. v. First Nat. Bank of Louisville, 4 Bush (Ky.) 98, 96 Am. Dec. 285; Miller v. First Nat. Bank, 46 Ohio St. 424.

In the absence of such a provision, the tax cannot be collected from the bank, but must be collected from the individual stockholders against whom it is assessed, in the same manner as other taxes are collected from individuals. Sumter County v. National Bank of Gainesville, 62 Ala. 464, 34 Am. Rep. 30.

It has been held that the state may allow a tax against the stockholders of a national bank on their shares, to be collected by levying upon the property of the bank, upon its failure to pay the tax as required by statute. First Nat. Bank v. Douglas County, 3 Dill. 330, Fed. Cas. No. 4,799. But the property of the bank cannot be levied upon in the absence of statutory provision therefor, under a tax warrant authorizing the collector to levy upon the property of the persons named therein (the stockholders), even when the bank is required by law to pay the tax. First Nat. Bank of Sandy Hill v. Fancher, 48 N. Y. 524.

That mandamus will lie to compel the bank to pay the tax, see Town of St. Albans v. National Car Co., 57 Vt. 68.

A state statute giving banks the option to pay a tax of four mills on each dollar on the actual value of their shares, or of collecting from their shareholders, and paying into the state treasury, a tax of eight mills on the dollar of the par value of the shares, is not invalid. Merchants' & Manufacturers' Nat. Bank v. Pennsylvania, 167 U. S. 461.

A law making national banks the agents of the state to collect from shareholders the tax on their shares is not invalid, because state banks are not required to do the same. Merchants' & Manufacturers' Nat. Bank v. Pennsylvania, 167 U. S. 461.

place than the place where the bank is located, but also impliedly prohibits a state from taxing a resident upon shares of stock in a national bank located in another state.[139] This exemption is within the constitutional powers of congress.[140] Resident holders of stock may be taxed at any place within the state which may be constitutionally fixed by the legislature, whether it be where the bank is located, or where the stockholders reside, or elsewhere.[141] If no place is fixed, resident shareholders are taxable on their shares at the place where they reside.[142]

——(cc) **Rate of taxation—Discrimination in favor of "other moneyed capital."**—It will be noticed that the act of congress, while it allows the state in which a national bank is located to determine and direct the manner and place of taxing its shares, expressly provides that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state." As might have been expected, the vagueness of this provision has given rise to much litigation, and the courts, including the supreme court of the United States, have frequently been called upon to construe and apply it to the tax laws of the various states.

[139] See First Nat. Bank of Louisville v. Kentucky, 9 Wall. (U. S.) 353; Austin v. Board of Aldermen of Boston, 14 Allen (Mass.) 359; Flint v. Board of Aldermen of Boston, 99 Mass. 141, 96 Am. Dec. 713; Howell v. Village of Cassopolis, 35 Mich. 471; People v. Moore, 1 Idaho, 504; Kyle v. Commissioners of Fayetteville, 75 N. C. 445.

[140] Flint v. Board of Aldermen of Boston, 99 Mass. 141, 96 Am. Dec. 713.

[141] Austin v. Board of Aldermen of Boston, 14 Allen (Mass.) 359; Austin v. Aldermen, 7 Wall. (U. S.) 694, 698; First Nat. Bank of Louisville v. Kentucky, 9 Wall. (U. S.) 353; Tappan v. Merchants' Nat. Bank of Chicago, 19 Wall. (U. S.) 490; Waite v. Dowley, 94 U. S. 527; Kyle v. Commissioners of Fayetteville, 75 N. C. 445; McLaughlin v. Chadwell, 7 Heisk. (Tenn.) 389; Providence Institution for Savings v. City of Boston, 101 Mass. 575; Howell v. Village of Cassopolis, 35 Mich. 471. Compare First Nat. Bank of Mendota v. Smith, 65 Ill. 44.

Since a state in which a national bank is located may determine where it will tax the shares of resident stockholders, and may tax them where they reside, instead of where the bank is located, it may by statute require the cashiers of national banks to send to officers of the various states or towns in the state the names of stockholders residing therein. Waite v. Dowley, 94 U. S. 527.

[142] Howell v. Village of Cassopolis, 35 Mich. 471. See ante, § 293(c).

The result of the decisions is not entirely clear, but some points seem to be settled.

The main purpose of congress in thus limiting the power of the states to tax investments in shares of national banks was to render it impossible for a state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business, and operations and investments of like character; and this must be taken into consideration in construing the act.[143] It is clear, therefore, that the provision renders illegal and inoperative any attempt by a state to tax national bank shares at such a rate or in such a mode as to impose a greater burden of taxation upon capital thus invested than is imposed upon other moneyed capital in the hands of individual citizens, and thus make a discrimination against capital invested in shares of national banks, and in favor of other moneyed capital.[144]

It has been held, therefore, that, where a tax is imposed upon the capital of state banks, but not upon the shares of stock, a statute which provides that shares in a national bank owned by any person or body corporate shall be "included in the valuation of the personal property of such person or body corporate, in the assessment of taxes," etc., without providing that the tax imposed shall not exceed the rate imposed upon

[143] Mercantile Bank v. New York, 121 U. S. 138; Aberdeen Bank v. Chehalis County, 166 U. S. 440; Providence Institution for Savings v. City of Boston, 101 Mass. 575.

[144] Van Allen v. Assessors, 3 Wall. (U. S.) 573; New York v. Commissioners of Taxes, 4 Wall. (U. S.) 244; Adams v. Nashville, 95 U. S. 19; Davenport Bank v. Davenport Board of Equalization, 123 U. S. 83; Mercantile Bank v. New York, 121 U. S. 138; Aberdeen Bank v. Chehalis County, 166 U. S. 440; First Nat. Bank of Utica v. Waters, 19 Blatchf. (U. S.) 242, 7 Fed. 152; St. Louis Nat. Bank v. Papin, 4 Dill. 29, Fed. Cas. No. 12,239; City Nat. Bank v. Paducah, 2 Flip. 61, Fed. Cas. No. 2,743; First Nat. Bank v. City of Covington, 103 Fed. 523; Pollard v. State, 65 Ala. 628; McHenry v. Downer. 116 Cal. 20; Providence Institution for Savings v. City of Boston, 101 Mass. 575; Wright v. Stilz, 27 Ind. 338; Craft v. Tuttle, 27 Ind. 332; Wasson v. First Nat. Bank of Indianapolis, 107 Ind. 206; Rosenberg v. Weekes, 67 Tex. 578; Whitney Nat. Bank v. Parker, 41 Fed. 402; Boyer v. Boyer, 113 U. S. 690; Boyer's Appeal, 103 Pa. St. 387; and cases cited in the notes following.

the stock in state banks, is in violation of the act of congress, and void.[145] If the statutes of a state do not give municipal corporations the power to tax shares of stock in state banks, they cannot tax shares in national banks.[146]

A tax on shares in national banks is illegal if they are valued on the assessment rolls at a higher proportion of their actual value than that at which other moneyed capital is valued.[147] "Any system of assessment of taxes," said Mr. Justice Miller, "which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the act of congress."[148]

——(dd) **Difference in mode of assessing taxes.**—Before an assessment of taxes upon shares in a national bank can be held invalid on the ground that it is in violation of the act of congress, it must affirmatively appear that a higher rate or burden of taxation is imposed upon the capital thus invested than is imposed upon other moneyed capital. It is not enough to show merely that the laws provide a different mode of taxing other moneyed capital.[149]

Thus, in a case which arose in New York, it was held that a tax upon the shares in national banks was not invalid because shares in trust companies created under the laws of that state were not directly taxed, where such companies were taxed upon the value of their capital stock, with deductions on account of property in which it was invested, and which was either otherwise taxed or not taxable, and were additionally

[145] Van Allen v. Assessors, 3 Wall. (U. S.) 573. And see Wright v. Stilz, 27 Ind. 338.

[146] Craft v. Tuttle, 27 Ind. 332.

[147] New York v. Weaver, 100 U. S. 539; Pelton v. Commercial Nat. Bank of Cleveland, 101 U. S. 143; First Nat. Bank of Toledo v. Treasurer of Lucas County, 25 Fed. 749; First Nat. Bank v. Lindsay, 45 Fed. 619. Compare Wagoner v. Loomis, 37 Ohio St. 571; Deposit Bank of Owensboro v. Daviess County (Ky.) 39 S. W. 1030.

[148] Pelton v. Commercial Nat. Bank of Cleveland, 101 U. S. 143.

[149] Mercantile Bank v. New York, 121 U. S. 139; Richards v. Town of Rock Rapids, 31 Fed. 505; Silver Bow County Com'rs v. Davis, 6 Mont. 306.

taxed upon their income by way of franchise tax, it not appearing that the rate of taxation thus imposed upon such companies, and indirectly on their shareholders, was less than that imposed on national bank shares.[150]

Of course, a state cannot, by taxing other money capital in a different mode from that in which national bank shares are taxed, indirectly impose a greater burden of taxation upon the latter, any more than it can do so directly by prescribing a different rate of taxation.[151]

——**(ee) Deduction of debts.**—If the laws of a state allow persons having credits subject to taxation, and which constitute a *material* portion of the moneyed capital of the state in the hands of its citizens, to deduct their debts therefrom for the purpose of taxation, while they deny to the holders of shares in national banks the right to deduct their debts from the assessed value of their shares, they are to such extent in violation of the act of congress, as they, in effect, tax such shares at a greater rate than is assessed upon other moneyed capital.[152] It has been held, however, that a shareholder can-

[150] Mercantile Bank v. New York, 121 U. S. 139.

[151] Pelton v. Commercial Nat. Bank of Cleveland, 101 U. S. 143; New York v. Weaver, 100 U. S. 539.

[152] New York v. Weaver, 100 U. S. 539, reversing 67 N. Y. 516; Albany County Sup'rs v. Stanley, 105 U. S. 305; Evansville Bank v. Britton, 105 U. S. 322; First Nat. Bank of Garnett v. Ayers, 160 U. S. 660; Richards v. Town of Rock Rapids, 31 Fed. 505; Whitney Nat. Bank v. Parker, 41 Fed. 402; Mercantile Nat. Bank of Cleveland v. Shields, 59 Fed. 952; Wasson v. First Nat. Bank of Indianapolis, 107 Ind. 206; Pollard v. State, 65 Ala. 628; McHenry v. Downer, 116 Cal. 20; First Nat. Bank v. Township of St. Joseph, 46 Mich. 526; McAden v. Mecklenburg County Com'rs, 97 N. C. 355; Peavey v. Greenfield, 64 N. H. 284; First Nat. Bank of Leoti v. Fisher, 45 Kan. 726; Ruggles v. City of Fond du Lac, 53 Wis. 436; Weston v. Manchester, 62 N. H. 574. Compare Bressler v. County of Wayne, 32 Neb. 834, overruling 25 Neb. 468.

Where a statute allows a deduction of legal bona fide debts owing by citizens of the state to be made from credits held by them for purposes of taxation, but the courts of the state hold that such deduction is not allowable from shares in a national bank, this is a discrimination in favor of other moneyed capital and against national bank shares. The fact that the deduction is also denied in the case of shares of railroad, insurance, and manufacturing companies is immaterial, for they are not "money capital." Mercantile Nat. Bank of Cleveland v. Shields, 59 Fed. 952. And see infra, this section.

Where a nonresident shareholder in a national bank is compelled to pay a tax at the place

not complain of such a statute, if he owes no debts, and that shareholders who do owe debts are not entitled to a release from the whole tax, but merely to a release to the extent to which they are entitled to a deduction of their debts.[153]

To render a tax upon shares in national banks invalid because of the allowance of deduction of debts from the valuation of other moneyed capital, the extent to which such deductions are allowed must be so large and substantial as to constitute a material discrimination against the capital invested in such shares.[154] It has been held, therefore, that, to defeat an assessment of taxes upon shares in a national bank, it is not enough to show merely that the statutes permit some debts to be deducted from some moneyed capital, but not from that which is invested in such shares.[155]

——(ff) **Effect of exemptions.**—It has been said in some of the cases that the provision in the act of congress that the taxation of national bank shares shall not be at a greater rate than is assessed upon other moneyed capital was not intended to, and does not, prevent a state from exempting any subject of taxation, including other moneyed capital, from taxation.[156] This statement, however, is too broad. Shares in national banks cannot be subjected to taxation by the state, or to local taxation under the authority of the state, where a very material part, relatively, of other moneyed capital in the hands of individual citizens within the state, or within the particular taxing district, as the case may be, is exempted from taxation. To allow this would be to allow the discrim-

where the bank is located, as permitted by the act of congress, he is entitled to all deductions from the valuation of his shares, on account of debts, that are allowed to resident shareholders. Mercantile Nat. Bank of Cleveland v. Shields, 59 Fed. 952.

[153] Albany County Sup'rs v. Stanley, 105 U. S. 305.

[154] First Nat. Bank of Garnett v. Ayers, 160 U. S. 660. And see First Nat. Bank of Wellington v. Chapman, 173 U. S. 205; Niles v. Shaw, 50 Ohio St. 370; Chapman v. First Nat. Bank of Wellington, 56 Ohio St. 310; Bressler v. County of Wayne, 32 Neb. 834, overruling 25 Neb. 468.

[155] First Nat. Bank of Garnett v. Ayers, 160 U. S. 660.

[156] See Everitt's Appeal, 71 Pa. St. 216; Gorgas' Appeal, 79 Pa. St. 149; McLaughlin v. Chadwell, 7 Heisk. (Tenn.) 389.

ination against shares in national banks and in favor of other moneyed capital which it was the purpose of the act of congress to prevent.[157] A state cannot tax shares in national banks, where shares in state banks are exempted from taxation, and not taxed either directly or indirectly.[158]

The act of congress, however, was not intended to curtail the power of the states on the subject of taxation further than to prevent unfriendly discrimination against shares in national banks. It was not intended to prevent, and does not prevent, a state from exempting particular kinds of property from taxation, if the exemption does not amount to a real discrimination against such shares.[159] The mere fact, therefore, that the state has exempted some banks or moneyed capital does not prevent it from taxing such shares.[160] A state is not prevented from taxing shares in national banks because in chartering a state bank it has exempted it from taxation.[161]

The fact that deposits in savings banks are exempted from state taxation on grounds of public policy, as is the case in some states, does not operate as an unfriendly discrimination against investments in national bank shares, and cannot affect the rule for the taxation of the latter.[162]

——(gg) **"Other moneyed capital in the hands of individual citizens."**—It will be noticed that the act of congress prohibits the taxation of shares in national banks at a greater rate than is assessed, not upon other property generally, but upon "other moneyed capital in the hands of individual citizens of the state."

[157] Boyer v. Boyer, 113 U. S. 689; McHenry v. Downer, 116 Cal. 20.

[158] McHenry v. Downer, 116 Cal. 20. And see Wright v. Stilz, 27 Ind. 338; Craft v. Tuttle, 27 Ind. 332.

[159] Hepburn v. School Directors, 23 Wall. (U. S.) 480; Adams v. Nashville, 95 U. S. 19; New York v. Commissioners of Taxes, 4 Wall. (U. S.) 244; Lionberger v. Rouse, 9 Wall. (U. S.) 468; Everitt's Appeal, 71 Pa. St. 216; Gorgas' Appeal, 79 Pa. St. 149; McLaughlin v. Chadwell, 7 Heisk. (Tenn.) 389.

[160] See the cases cited in the note preceding.

[161] Lionberger v. Rouse, 9 Wall. (U. S.) 468.

[162] Mercantile Bank v. New York, 121 U. S. 138; Davenport Bank v. Davenport Board of Equalization, 123 U. S. 83; Bank of Redemption v. Boston, 125 U. S. 60; Aberdeen Bank v. Chehalis County, 166 U. S. 440.

The term "moneyed capital," as used in the act, embraces capital employed in national banks, and capital otherwise employed by individuals, when the object of their business is the making of profit by the use of their capital as money,—as in banking, loans, etc. But it does not include moneyed capital in the hands of a corporation, even if its business be such as to make its shares moneyed capital when in the hands of individuals, or if it invests its capital in bonds or other securities payable in money.[163]

The term "moneyed capital," it has been said, does not mean all capital the value of which is measured in terms of money, for in this sense all kinds of real and personal property would be included, since they all have an estimated value as the subjects of sale. Nor does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation; but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money.[164] It is clear, therefore, that the validity of a tax on shares in national banks is in no way affected, in so far as this provision of the act of congress is concerned, by the mode of taxa-

[163] Mercantile Bank v. New York, 121 U. S. 138; Mercantile Nat. Bank of Cleveland v. Shields, 59 Fed. 952.

[164] Per Mr. Justice Matthews, in Mercantile Bank v. New York, 121 U. S. 138, 155.

"Moneyed capital," said the supreme court of the United States, "does not mean all capital the value of which is measured in terms of money, neither does it necessarily include all forms of investments in which the interest of the owner is expressed in money. * * * The result seems to be that the term 'moneyed capital,' as used in the federal statute, does not include capital which does not come into competition with the business of national banks." First Nat. Bank of Wellington v. Chapman, 173 U. S. 205.

tion resorted to by the state, or the rate of taxation, or exemptions from taxation, or the allowance of deductions on account of debts, in the case of the shares of stock or the property of railroad companies, mining companies, insurance companies, manufacturing companies, and the like.[165] The act does not prevent the taxation of shares of stock in the insurance companies on income instead of value, and the taxation of shares in national banks on value.[166] Nor does it render a tax on shares in national banks invalid because of the exemption from taxation of deposits in savings banks, and moneys belonging to charitable and educational institutions.[167]

The act, said Mr. Justice Matthews, by the expression "moneyed capital in the hands of individuals," includes "shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment."[168]

Although trust companies created under the laws of New

[165] Mercantile Bank v. New York, 121 U. S. 138; Aberdeen Bank v. Chehalis County, 166 U. S. 440; McMahon v. Palmer, 102 N. Y. 176; Mercantile Nat. Bank of Cleveland v. Shields, 59 Fed. 952; Talbott v. Silver Bow County, 139 U. S. 438; First Nat. Bank of Utica v. Waters, 19 Blatchf. (U. S.) 242, 7 Fed. 152.

The right of a state to tax national bank shares is not affected by the fact that it does not tax shares in building and loan associations. Consolidated Nat. Bank v. Pima County (Ariz.) 48 Pac. 291.

[166] Aberdeen Bank v. Chehalis County, 166 U. S. 440.

[167] Aberdeen Bank v. Chehalis County, 166 U. S. 440. And see supra, this section.

[168] Mercantile Bank v. New York, 121 U. S. 138, 157. And see Evansville Bank v. Britton, 105 U. S. 322; Mercantile Nat. Bank of Cleveland v. Shields, 59 Fed. 952.

York were not "banks" in the commercial sense of the word, it was held that shares in such companies were moneyed capital in the hands of individuals, within the act.[169]

Bonds issued by a state, or under its authority by a municipal corporation, are from their nature not ordinarily the subjects of taxation, and, although they undoubtedly represent moneyed capital, they are not within the reason of the act of congress relating to the taxation of national bank shares.[170]

§ 295. Interference with foreign or interstate commerce.

Since the constitution of the United States gives congress the power "to regulate commerce with foreign nations, and among the several states,"[171] and the power thus conferred is exclusive, laws of a state, including laws imposing a tax upon corporations, which amount to a regulation of or interference with foreign or interstate commerce, are unconstitutional and void. No state, therefore, can lawfully impose a tax, directly or indirectly, upon the transportation of persons or property from one state into another, from a state into a foreign country, or from a foreign country into a state.[172] For this reason a Pennsylvania statute was held void in so far as it undertook to impose a tax upon the capital stock of a New Jersey corporation engaged in maintaining and operating a ferry over the Delaware river between New Jersey and

[169] Mercantile Bank v. New York, 121 U. S. 138.

[170] Mercantile Bank v. New York, 121 U. S. 138; Pollard v. State, 65 Ala. 628.

[171] Const. U. S. art. 1, § 8.

[172] Crandall v. Nevada, 6 Wall. (U. S.) 35; State Freight Tax, 15 Wall. (U. S.) 233; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Leloup v. Port of Mobile, 127 U. S. 640; Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114; Crutcher v. Kentucky, 141 U. S. 47; People v. Wemple, 138 N. Y. 1; and cases cited in the notes following.

A statute imposing a specific tax upon corporations engaged in mining, smelting, and refining ores within the state, which provides for the payment of a tax of one and one-half cents per ton on all iron ore or mineral obtained and exported from the state before being smelted, but exempted from taxation all that might be smelted within the state, was held void as an attempt, in effect, to impose a tax upon interstate commerce. Jackson Mining Co. v. Auditor General, 32 Mich. 488.

As to the power to tax foreign corporations and its limitation by this clause of the federal constitution, see post, "Foreign Corporations."

Pennsylvania.[173] For the same reason a state cannot impose a tax on freight transported from one state into another.[174]

A state, in its taxation of property within the state, cannot discriminate against property transported into the state from another state, even after it is in the state. In other words, a commodity cannot be taxed because of the fact that it has been transported from another state,[175] for the exclusive power of congress to regulate interstate commerce "continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. The power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin."[176]

Telegraph companies engaged in sending and receiving messages to and from another state or a foreign country are to that extent engaged in interstate and foreign commerce, and a state can neither impose a tax directly upon such messages,[177] nor impose a license tax upon their interstate or foreign business.[178]

The constitution does not prevent a state from imposing a tax upon its internal commerce, as upon persons or property transported from one point to another within the state, or from otherwise taxing the property, franchises, or business of its own corporations, provided it does not thereby interfere with interstate or foreign commerce.[179] A license tax may be im-

[173] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

[174] State Freight Tax, 15 Wall. (U. S.) 232; State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284. And see Crandall v. Nevada, 6 Wall. (U. S.) 35.

[175] Walling v. Michigan, 116 U. S. 446; Welton v. Missouri, 91 U. S. 275; Cook v. Pennsylvania, 97 U. S. 566; Guy v. Baltimore, 100 U. S. 434; Tiernan v. Rinker, 102 U. S. 123; Webber v. Virginia, 103 U. S. 344; Higgins v. Three Hundred Casks of Lime, 130 Mass. 1.

[176] Mr. Justice Field, in Welton v. Missouri, 91 U. S. 275, 282.

[177] Western Union Tel. Co. v. Texas, 105 U. S. 460; Ratterman v. Western Union Tel. Co., 127 U. S. 411; Western Union Tel. Co. v. Alabama, 132 U. S. 472; American Union Tel. Co. v. Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90; City & County of San Francisco v. Western Union Tel. Co., 96 Cal. 140.

[178] Leloup v. Port of Mobile, 127 U. S. 640. And see Western Union Tel. Co. v. Massachusetts, 125 U. S. 530.

[179] State Freight Tax, 15 Wall. (U. S.) 232.

It may tax messages of a telegraph company which are transmitted from one point to another

posed upon express companies, railroad companies, telegraph companies, and other corporations doing a local business within the state.[180]

Nor does the constitution prevent a state from imposing taxes upon the property of corporations engaged in interstate commerce, if it is situated in the state. Thus, it may tax the boats and cars of a ferry company, steamboat company, canal company, or railroad company, within the state, notwithstanding the fact that they are employed in interstate commerce.[181] It may tax a railroad company, express company, telegraph company, or other corporation engaged in interstate commerce, or any property, real or personal, owned by it within the state.[182]

"It is not and cannot be doubted," said Mr. Justice Gray, "that each state of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce,

within the state, although the company may also be engaged in interstate business. Ratterman v. Western Union Tel. Co., 127 U. S. 411.

[180] Postal Tel. Cable Co. v. Charleston, 153 U. S. 692; Osborne v. Florida, 164 U. S. 650; Western Union Tel. Co. v. City of Fremont, 39 Neb. 692; Alabama Great Southern R. Co. v. City of Bessemer, 113 Ala. 668; City of Anniston v. Southern Ry. Co., 112 Ala. 557.

[181] Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365.

[182] Massachusetts v. Western Union Tel. Co., 141 U. S. 40; Postal Tel. Cable Co. v. Adams, 155 U. S 688; Western Union Tel. Co. v. Taggart, 163 U. S. 1.

In a late case it was held by the supreme court of the United States that, although the transportation of the subjects of interstate commerce, or the receipts derived therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations engaged in such commerce may be; and that, whatever the particular form of the exaction, if it is essentially only property taxation, it does not come within the inhibition of the constitution. Adams Express Co. v. Ohio, 165 U. S. 194.

The property of corporations engaged in interstate commerce, situated in the several states through which their lines or business extends, may be valued as a unit for the purpose of taxation, taking into consideration the uses to which it is put, and all the elements making up aggregate value, and a portion of the whole fairly and properly ascertained may be taxed by the particular state. This is true of express companies, as well as of railroad and telegraph companies. Adams Express Co. v. Ohio, 165 U. S. 194; Adams Express Co. v. Kentucky, 166 U. S. 171, 185.

provided the rights and powers of the national government are not interfered with."[183]

Nor does the constitution prevent a state from levying a tax upon the gross receipts of a railroad company or other corporation engaged in interstate commerce after such receipts have been paid into its treasury. Such a tax is not a tax upon the business of interstate transportation, nor an interference with interstate commerce, even though the receipts may be in part from the business of interstate transportation of persons or property.[184] A state, however, cannot tax specifically the gross receipts of a railroad company or other corporation derived from its interstate commerce; for, while a state may tax the money actually within the state, after it has passed beyond the stage of compensation for carrying persons or property, as it may tax other money or property within its limits, a tax upon receipts for this class of carriage specifically is a tax upon the commerce out of which it arises.[185]

This clause of the constitution does not prevent a city from requiring a telegraph company to pay a license fee or tax for the use of its streets by placing poles and stringing wires therein, if the fee or tax is reasonable.[186]

A corporation created for the mere purpose of constructing and maintaining a bridge over a river between two states, and authorized to collect tolls for the use of the same, is not engaged in interstate commerce, so as to prevent a state from imposing a tax upon its franchise or property.[187]

[183] Western Union Tel. Co. v. Taggart, 163 U. S. 1, 14.

[184] State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284.

[185] Fargo v. Michigan, 121 U. S. 230; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326.

[186] City of St. Louis v. Western Union Tel. Co., 148 U. S. 92, 149 U. S. 465; Postal Tel. Cable Co. v. City of Baltimore, 79 Md. 502; City of Chester v. Philadelphia, Reading & P. Tel. Co., 148 Pa. St. 120; City of Allentown v. Western Union Tel. Co., 148 Pa. St. 117. Compare Hodges v. Western Union Tel. Co., 72 Miss. 910.

It cannot impose an unreasonable license fee. City of St. Louis v. Western Union Tel. Co., 63 Fed. 68, affirmed 166 U. S. 388; City of Philadelphia v. Western Union Tel. Co., 40 Fed. 615, 82 Fed. 797.

[187] Henderson Bridge Co. v. Com., 99 Ky. 623.

§ 296. Laying impost or duty on imports or exports—Laying duty of tonnage.

The constitution of the United States declares that "no state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."[188]

A state law levying a tax on the gross receipts of a railroad company is not invalid as laying an impost or duty on imports or exports.[189]

The provision does not refer to articles brought from one state into another, but is limited to articles imported from or exported to foreign countries. Hence, a tax imposed by a state upon all auction sales, whether by citizens of such state or of another state, and whether the articles are the products of such state or of another state, without any discrimination, is not invalid.[190]

The constitution of the United States also provides that "no state shall, without the consent of congress, lay any duty of tonnage."[191] Any duty, or tax, or burden, said Mr. Justice Miller, imposed under the authority of the states, which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, and which is assessed upon a vessel according to its carrying capacity, is a violation of this prohibition.[192]

Taxes levied, as on property, by a state upon vessels owned

[188] Const. U. S. art. 1, § 10, cl. 2. See Brown v. Maryland, 12 Wheat. (U. S.) 419.

[189] State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284.

[190] Woodruff v. Parkham, 8 Wall. (U. S.) 123; Howe Machine Co. v. Gage, 100 U. S. 676.

[191] Const. U. S. art. 1, § 10, cl. 3. See State Tonnage Tax Cases, 12 Wall. (U. S.) 204; Peete v. Morgan, 19 Wall. (U. S.) 581; Cannon v. New Orleans, 20 Wall. (U. S.) 577; Inman Steamship Co. v. Tinker, 94 U. S. 238.

[192] Cannon v. New Orleans, 20 Wall. (U. S.) 577.

by its corporations or citizens, and based on a valuation of the same, are not within the prohibition; but taxes cannot be imposed upon them by the state at so much per ton of the registered tonnage. This is laying a duty on tonnage.[193] The fact that the vessels are not only owned by corporations or citizens of the state, but are engaged exclusively between points within the state, gives the state no power to lay such duty.[194]

§ 297. Power of congress to impose taxes.

Under the power given to congress by the constitution of the United States "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States,"[195] congress may tax corporations as well as natural persons.[196] But the constitution also provides, by way of limitation on the power of congress, (1) that "all duties, imposts and excises shall be uniform throughout the United States;"[197] (2) that "no capitation or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken;"[198] (3) that "no tax or duty shall be laid on articles exported from any state;"[199] and (4) that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another."[200]

[193] State Tonnage Tax Cases, 12 Wall. (U. S.) 204.

[194] State Tonnage Tax Cases, 12 Wall. (U. S.) 204.

[195] Const. U. S. art. 1, § 8, cl. 1.

[196] Veazie Bank v. Fenno, 8 Wall. (U. S.) 533.

[197] Const. U. S. art. 1, § 8, cl. 1.

[198] Const. U. S. art. 1, § 9, cl. 4. It was until recently considered that capitation taxes and taxes on land were the only "direct" taxes, within the meaning of the constitution. See Springer v. United States, 102 U. S. 586. But in the Income Tax Case, decided by the supreme court of the United States in 1895, it was held that taxes on personal property, as well as taxes on real property, taxes on the rents or income of real estate, and taxes on the income of personal property, are all direct taxes. Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601.

[199] Const. U. S. art. 1, § 9, cl. 5.

[200] Const. U. S. art. 1, § 9, cl. 6.

§ 298. "Due process of law."

The constitution of the United States declares that no state shall "deprive any person of life, liberty, or property, without due process of law,"[201] and there are similar provisions in state constitutions. This provision protects corporations as well as natural persons,[202] and it protects them against tax laws which deprive them of their property without due process of law.

The provision has sometimes been relied upon as rendering invalid tax laws allowing the assessment and collection of taxes without providing for judicial proceedings. It is well settled, however, by decisions of the supreme court of the United States, that regular judicial proceedings in the assessment and collection of taxes are not necessary to constitute due process of law.[203] "Taxes," said Mr. Justice Miller, "have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is, and always has been, due process of law."[204] In an earlier case it was said by Mr. Justice Miller: "Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said

[201] Const. U. S. Amend. 14, § 1.

[202] See ante, § 24(e).

[203] Davidson v. New Orleans, 96 U. S. 97; Adams Express Co. v. Ohio, 165 U. S. 194.

[204] Kelly v. Pittsburgh, 104 U. S. 78.

to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."[205]

In a still later case it was said by Mr. Justice Field: "Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. * * * But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."[206]

Requiring corporation to pay tax on shares.—As we have seen, a corporation may be required to pay a tax levied upon the shares of its capital stock in the hands of its stockholders,

[205] Davidson v. New Orleans, 96 U. S. 97, 104.

[206] Hagar v. Reclamation District No. 108, 111 U. S. 701, 709, 710.

and allowed to deduct the same from dividends, or otherwise collect it from the stockholders. This does not deprive the corporation of its property without due process of law.[207] In a late Connecticut case it was held that a statute requiring the payment by each corporation whose stock was liable to taxation, and not otherwise taxed, of one and one-half per cent. of the value of the stock of nonresident stockholders, was not unconstitutional as depriving the corporation of its property without due process of law, although another statute gave the corporation a lien on such stock for only one per cent. of the value of the stock for such payments, where still another statute gave it a lien on all the stock owned by any person therein for all debts due to it by him, and another provided that all taxes properly assessed should become a debt due from the person whose property should be taxed.[208]

§ 299. Exemption from taxation.

(a) Exemption by reason of public nature or public services of corporation.—Of course, a public corporation—that is, a corporation established by the state merely as an agency or instrument of government[209]—is not taxable. But this principle does not apply to those private corporations, called *quasi* public,[210] which perform services which are peculiarly beneficial to the public, like railroad companies, water and gas companies, and the like. Such corporations are in no sense instruments of government, and their property is taxable to the same extent as the property of any other private corporation, unless it has been expressly exempted by the legislature.[211] The fact that part, or even most, of the stock of a water or gas company, is owned by the city in which it is located, does not exempt its property from taxation.[212] No

[207] Ante, §§ 286(e), 294(c)(4).

[208] State v. Travelers' Ins. Co., 70 Conn. 590, 66 Am. St. Rep. 138.

[209] Ante, § 31

[210] Ante, § 31(c).

[211] People v. Forrest, 97 N. Y. 97; Louisville Water Co. v. Hamilton, 81 Ky. 517; Com. v. Lowell Gas Light Co., 12 Allen (Mass.) 75; Thomson v. Union Pac. Ry. Co., 9 Wall. (U. S.) 579.

[212] Louisville Water Co. v. Hamilton, 81 Ky. 517.

private corporation can claim an exemption from the power of the state to impose taxes, unless the state has granted such an exemption.

(b) Grant of exemption by the state—(1) Constitutional prohibition.—In some states the constitution expressly provides that the legislature shall not grant an exemption from taxation, or limits its power in this respect to particular corporations, as religious, educational, or charitable corporations, or to particular property, or property used for a particular purpose. Of course, a grant of exemption to a corporation in violation of such a prohibition is absolutely void.[213]

[213] Louisville & Nashville R. Co. v. Palmes, 109 U. S. 244; Jack v. Weinnett, 115 Ill. 105, 56 Am. Rep. 129; Hibernian Benevolent Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769; Hogg v. Mackay, 23 Or. 339, 37 Am. St. Rep. 682; Nashville & Knoxville R. Co. v. Wilson County, 89 Tenn. 597; Little Rock & Ft. Smith Ry. Co. v. Worthen, 46 Ark. 312; and other cases cited in this and following notes.

The legislature cannot grant to corporations, for pecuniary profit, any exemption from taxation not enjoyed by private individuals, where there is a constitutional provision that the property of such corporations shall be subject to taxation the same as that of individuals. City of Mobile v. Stonewall Ins. Co., 53 Ala. 570; City of Davenport v. Chicago, Rock Island & Pac. R. Co., 38 Iowa, 633; Iowa Homestead Co. v. Webster County, 21 Iowa, 221; Adams v. Yazoo & Mississippi Valley R. Co., 75 Miss. 275.

It has been held that such a provision should not be construed as prohibiting the granting of exemptions to quasi public corporations, like railroad companies. Yazoo & Mississippi Valley R. Co. v. Board of Levee Commissioners, 37 Fed. 24. See, however, the cases cited in the paragraph preceding this.

Under a constitutional provision that the legislature "shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law," the legislature has no power to exempt any property not used for the purposes specified. Hibernian Benevolent Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769; Hogg v. Mackay, 23 Or. 339, 37 Am. St. Rep. 682.

According to the weight of authority, a constitutional provision exempting or authorizing the legislature to exempt certain property or certain corporations from taxation impliedly prohibits any other exemptions than those specified. See State v. City of Indianapolis, 69 Ind. 375, 35 Am. Rep. 223; Denston v. Terry, 141 Ind. 677; Charlotte Building & Loan Ass'n v. Commissioners of Mecklenburg County, 115 N. C. 410; Northwestern University v. People, 80 Ill. 333; City of Chicago v. Baptist Theological Union, 115 Ill. 245; People's Loan & Homestead Ass'n v. Keith, 153 Ill. 609; State v. Armstrong, 17 Utah, 166; Donohugh's Appeal, 86 Pa. St. 306; Union Pacific R. Co. v. Saunders County Com'rs, 7 Neb. 228; City of New Orleans v. People's Ins. Co., 27 La.

Such a prohibition applies to the renewal, after its adoption, of an exemption previously granted, although it does not affect an exemption previously granted and which has not expired.[214]

Ann. 519; Louisiana Cotton Mfg. Co. v. City of New Orleans, 31 La. Ann. 440; Chesapeake & Ohio R. Co. v. Miller, 19 W. Va. 408; Nashville & Knoxville R. Co. v. Wilson County, 89 Tenn. 597; City of Memphis v. City Bank of Memphis, 91 Tenn. 574; Fletcher v. Oliver, 25 Ark. 289.

Contra, Williamson v. Massey, 33 Grat. (Va.) 237. And see Francis v. Atchison, Topeka & S. F. R. Co., 19 Kan. 303; Ottawa County Com'rs v. Nelson, 19 Kan. 234, 27 Am. Rep. 101.

A constitutional prohibition against granting exemption from taxation cannot be evaded by the legislature by indirectly exempting property, as by directing certain property to be omitted from the assessment. Little Rock & Ft. Smith Ry. Co. v. Worthen, 46 Ark. 312; Huntington v. Worthen, 120 U. S. 97.

A statute which attempts, by commutation, to relieve a railroad company from the payment of any taxes on its property for a certain period, in consideration of its agreement to carry the troops and munitions of war of the state free of charge, is in violation of a constitutional provision that all taxation shall be equal and uniform, and that a just valuation of all property shall be made for the purpose of taxation. Hogg v. Mackay, 23 Or. 339, 37 Am. St. Rep. 682. "The legislature," said the court in this case, "cannot do indirectly what it is prohibited from doing directly. The right to commute is simply an incident of the right to exempt, and the denial of the power to exempt must necessarily preclude the existence of the power to commute." See, also, Louisiana Cotton Mfg. Co. v. City of New Orleans, 31 La. Ann. 440; Huntington v. Worthen, 120 U. S. 97.

Where a corporation is in fact of such a class as to fall within a constitutional provision imposing a tax, the legislature cannot exempt it from such tax by declaring it to be of a class (benevolent corporations) excepted by the constitution. State v. McGrath, 95 Mo. 193.

Where the constitution of a state expressly provides that a particular class of property shall be taxed, the legislature cannot exempt it. Mackay v. City & County of San Francisco, 113 Cal. 392.

Where the constitution prohibits exemption of the property of corporations from taxation except where it is actually used for church, school, or charitable purposes, the legislature cannot exempt property used only in part for such purposes. City of New Orleans v. New Orleans Water Works Co., 36 La. Ann. 432.

A constitutional provision allowing the legislature to exempt from taxation the buildings of "institutions of purely public charity," only applies to buildings owned and exclusively used by such institutions, and it does not apply, therefore, to a building which is owned by a Masonic order, but a part of which is leased by it for purposes not connected with its objects, though the rent received is applied by it to its general objects. Morris v. Lone Star Chapter, No. 6, Royal Arch Masons, 68 Tex. 698.

[214] Trask v. Maguire, 18 Wall. (U. S.) 391; Louisville & Nashville R. Co. v. Palmes, 109 U. S. 244; St. Louis, Iron Mountain & S. Ry. Co. v. Berry, 113 U. S. 465; Boody v. Watson, 63 N. H. 320. Compare Citizens' Bank of Louisiana v. Board of Assessors of New Orleans, 54 Fed. 73. See City of St. Paul v. St. Paul & Sioux City R. Co., 23 Minn. 469.

If a state acquires the property of a corporation which is exempt

And it has been held that an exemption of a corporation does not continue where, after the adoption of a constitutional prohibition against exemptions from taxation, it accepts an act amending its charter so as to make it a corporation of a different character or for a different purpose.[215]

It has been held that a constitutional prohibition against exemptions from taxation does not apply to a *quasi* public corporation, like a railroad company, for example.[216]

Before a grant of exemption from taxation in the charter

from taxation, and grants the same to a new corporation after the adoption of a constitutional prohibition against the grant of an exemption from taxation, the exemption does not and cannot pass to the new company. Trask v. Maguire, 18 Wall. (U. S.) 391.

Nor can the legislature, after the adoption of such a constitutional prohibition, allow a corporation to transfer its exemption from taxation to another corporation, or provide for its transfer to a purchaser under foreclosure of a mortgage. Louisville & Nashville R. Co. v. Palmes, 109 U. S. 244.

Nor, where corporations are consolidated after the adoption of such a constitutional prohibition, can the new corporation be given an exemption from taxation enjoyed by one or all of the old corporations. St. Louis, Iron Mountain & S. Ry. Co. v. Berry, 113 U. S. 465; Memphis & Little Rock R. Co. v. Railroad Commissioners, 112 U. S. 609; Chesapeake & Ohio Ry. Co. v. Miller, 114 U. S. 176.

A exemption of the stock of a railroad company from taxation does not apply to stock issued by it for the construction of branch roads under authority conferred by a statute passed after the adoption of a constitutional prohibition against exemptions from taxation. Chicago, Burlington & K. C. R. Co. v. Guffey, 120 U. S. 569.

Where the state constitution prohibited the legislature from extending or renewing existing charters, or passing any general or special law for the benefit of a corporation, except on condition that the corporation should thereafter hold its charter subject to the provisions of the constitution, one of which prohibited exemptions, and the legislature passed an act for the benefit of a corporation, providing that it should not take effect unless accepted under the provisions of the constitution,—it was held that acceptance of the act by the corporation waived an exemption from taxation granted by its charter, if the legislature had power to impose the condition. Citizens' Bank of Louisiana v. Board of Assessors of New Orleans, 54 Fed. 73.

[215] Memphis City Bank v. Tennessee, 161 U. S. 186, where the charter of an insurance company was amended so as to change it into a banking corporation.

[216] Yazoo & Mississippi Valley R. Co. v. Board of Levee Commissioners, 37 Fed. 24.

In this case it was held that a constitutional provision that the property of all corporations for pecuniary profit shall be subject to taxation the same as the property of individuals, and that taxes shall be equal and uniform, applies only to corporations which are purely private, and does not prevent the legislature from granting an exemption from taxation to a quasi public corporation, like a railroad company. See, however, note 213, supra.

of a corporation can take effect, the corporation must accept the charter; and it has been held, therefore, that a grant of exemption in the charter of a corporation is revoked by the adoption of a constitutional prohibition against such exemptions before the first meeting for the purpose of organizing the corporation.[217]

——**(2) In the absence of a constitutional prohibition—Obligation of contract.**—Some of the state courts and some of the individual judges of the supreme court of the United States have held that, even in the absence of a constitutional prohibition, the legislature of a state has no power to bargain away the taxing power of the state by granting an irrevocable exemption from taxation.[218] The contrary rule, however, is now well established by the decisions of the supreme court of the United States, which, of course, are controlling and must be followed by the state courts. According to these decisions, in the absence of a constitutional prohibition, the legislature of a state has the power, for a consideration, to grant to a private corporation an exemption from taxation, either for a limited time or forever, or to agree to tax it to a certain extent only; and, if it does so, it cannot afterwards revoke the exemption or impose taxes in violation of the agreement, unless it has reserved the right to do so. In such a case the grant of exemption from taxation is a contract between the state and the corporation, within the meaning of the provision in the federal constitution prohibiting any state from passing laws impairing the obligation of contracts.[219] This

[217] Planters' Ins. Co. v. Tennessee, 161 U. S. 193. On this point, see ante, §§ 44(1), 270(c).

[218] See the dissenting opinions of Chief Justice Chase, and Justices Miller and Field, in Washington University v Rouse, 8 Wall. 439. And in the state courts, see East Saginaw Mfg. Co. v. City of East Saginaw 19 Mich. 259, 2 Am. Rep. 82; Brewster v. Hough, 10 N. H. 138; Raleigh & Gaston R. Co. v. Reid, 64 N. C. 155 (overruled in 13 Wall. 269); Mechanics' & Traders' Branch of State Bank v. Debolt, 1 Ohio St. 591 (overruled in 18 How. [U. S.] 380); Mott v. Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664; West Wisconsin Ry. Co. v. Trempealeau County Sup'rs, 35 Wis. 257.

[219] Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430; Washington University v. Rouse, 8 Wall. (U. S.) 439; Wilmington & Weldon R. Co. v. Reid, 13 Wall. (U.

contract can no more be repealed or impaired by the adoption of a constitutional provision than by an act of the legislature.[220]

In accordance with this doctrine it has been held that, where *all* the property of a college has been exempted from taxation forever, a statute limiting the exemption to the property in immediate use by it is void;[221] and that, where it is stipulated in the charter of a bank or any other corporation that it shall pay a certain tax, and that this tax shall be in lieu of all other taxes, the state cannot afterwards impose a greater or different tax.[222] Many other illustrations of the application of the doctrine will be found in the notes following.

A tax upon shares of stock in the hands of the stockhold-

S.) 264; Dodge v. Woolsey, 18 How. 331; New Jersey v. Yard, 95 U. S. 104; Farrington v. Tennessee, 95 U. S. 679; Mobile & Ohio R. Co. v. Tennessee, 153 U. S. 486; Wilmington & Weldon R. Co. v. Alsbrook, 146 U. S. 279; Jefferson Branch Bank v. Skelly, 1 Black (U. S.) 436; Northwestern University v. Illinois, 99 U. S. 309; New Orleans v. Houston, 119 U. S. 265; St. Anna's Asylum v. New Orleans, 105 U. S. 362.

And in the state courts see, among many other cases which might be cited, Mobile & Spring Hill R. Co. v. Kennerly, 74 Ala. 566; Oliver v. Memphis & Little Rock R. Co., 30 Ark. 128; Atlantic & Gulf R. Co. v. Allen, 15 Fla. 637; Western & Atlantic R. Co. v. State, 54 Ga. 428; Illinois Central R. Co. v. McLean County, 17 Ill. 291; Neustadt v. Illinois Central R. Co., 31 Ill. 484; Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 370; State v. Baltimore & Ohio R. Co., 48 Md. 49; O'Donnell v. Bailey, 24 Miss. 386; Mobile & Ohio R. Co. v. Moseley, 52 Miss. 127; Mechanics' Bank v. City of Kansas City, 73 Mo. 555; Livingston County v. Hannibal & St. Joseph R. Co., 60 Mo. 516; State Board of Assessors v. Morris & Essex R. Co., 49 N. J. Law, 193; Singer Mfg. Co. v. Heppenheimer, 58 N. J. Law, 633; Iron City Bank v. City of Pittsburgh, 37 Pa. St. 340; Bank of Commerce v. McGowan, 6 Lea (Tenn.) 703; State v. Butler, 86 Tenn. 614; University of the South v. Skidmore, 87 Tenn. 155; City of Memphis v. City Bank of Memphis, 91 Tenn. 574; State v. Bank of Commerce, 95 Tenn. 221; Rutland Savings Bank v. Town of Rutland, 52 Vt. 463; City of Petersburg v. Petersburg Benevolent Mechanics' Ass'n, 78 Va. 431; Whiting v. Town of West Point, 88 Va. 905, 29 Am. St. Rep. 750; Chesapeake & Ohio R. Co. v. Miller, 19 W. Va. 408; Milwaukee Electric Railway & Light Co. v. City of Milwaukee, 95 Wis. 42.

As to the exemption of foreign corporations, see chapter XXVI.

[220] Dodge v. Woolsey, 18 How. (U. S.) 331.

[221] Northwestern University v. Illinois, 99 U. S. 309.

[222] Dodge v. Woolsey, 18 How. (U. S.) 331. See, also, State Bank of Ohio v. Knoop, 16 How. (U. S.) 369; Farrington v. Tennessee, 95 U. S. 679; State v. Butler, 86 Tenn. 614; Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 370; and other cases cited in note 219, supra.

ers, which the corporation is required to pay irrespective of any dividends or profits payable to the stockholders, is substantially a tax upon the corporation, and cannot be imposed where the corporation is exempt from taxation.[223]

——Impairment of contract must be by a law of the state.— The constitutional prohibition against the passage by the state of any law impairing the obligation of contracts only applies where it is claimed that the obligation of a contract is impaired by a *law* of the state,—a statute or constitutional provision of the state. It does not apply to mere decisions of state courts construing a contract.[224] The constitutional prohibition, therefore, is not violated by a decision of a state court that a law exempting from taxation does not apply to particular property.[225] Where a contract of exemption from taxation between a city and a waterworks company was declared void by the highest court of the state, on grounds involving no question under the federal constitution, it was held that there was no impairment of the contract by subsequent legislation which assumed the contract to have been void.[226]

In order to come within this prohibition, said Mr. Justice Gray, "not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."[227] "It must," said Mr. Justice Miller in another case, "be the constitution, or some law of the state, which impairs the obligation of the contract, or

[223] New Orleans v. Houston, 119 U. S. 265.

[224] Mississippi & Missouri R. Co. v. Rock, 4 Wall. (U. S.) 177; New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18; New Orleans v. New Orleans Water Works Co., 142 U. S. 79; St. Paul, Minneapolis & M. Ry. Co. v. Todd County, 142 U. S. 282.

[225] St. Paul, Minneapolis & M. Ry. Co. v. Todd County, 142 U. S. 282.

[226] New Orleans v. New Orleans Water Works Co., 142 U. S. 79.

[227] New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 30.

which is otherwise in conflict with the constitution of the United States; and the decision of the state court must sustain the law or constitution of the state in the matter in which the conflict is supposed to exist."[228]

——**(3) Reservation of power to alter, amend, or repeal charter or statute.**—If the legislature in granting a charter and exempting a corporation from taxation, in whole or in part, or in granting an exemption by a statute passed after the grant of a charter, reserves the right to alter, amend, or repeal the charter or statute, it may afterwards revoke the exemption or increase a tax imposed by the charter;[229] or it may change the mode of taxation.[230] The revocation of an exemption under such power may be by a general law.[231]

When corporations whose property has been exempted from taxation consolidate under legislative authority, and a new corporation is created, and the original corporations dissolve, the new corporation is subject to a constitutional provision or a general law adopted or enacted after the creation of the original corporations, but before the statute authorizing the consolidation, reserving to the legislature the power to alter, amend, or repeal charters, or withdraw franchises, subsequently granted, and the new corporation is therefore subject to taxation.[232] And if a charter granting an exemption from taxation is amended when a general law is in force reserving the right to alter, amend, or repeal all charters, and the amendment is accepted by the corporation, the general law is appli-

[228] Mississippi & Missouri R. Co. v. Rock, 4 Wall. (U. S.) 177, 181.

[229] Union Passenger Ry. Co. v. Philadelphia, 101 U. S. 528; Tomlinson v. Jessup, 15 Wall. (U. S.) 454, 2 Smith's Cas. 740; Ohio Life Insurance & Trust Co. v. Debolt, 16 How. (U. S.) 416; Northern Bank of Kentucky v. Stone, 88 Fed. 413; Iron City Bank v. City of Pittsburg, 37 Pa. St. 340; Com. v. Fayette County R. Co., 55 Pa. St. 452; Wagner Free Institute v. City of Philadelphia, 132 Pa. St. 612, 19 Am. St. Rep. 613; Morris & Essex R. Co., v. Miller, 30 N. J. Law, 368; City of New York v. Twenty-Third Street Ry. Co., 113 N. Y. 311; State v. Northern Central Ry. Co., 44 Md. 131.

[230] Detroit City Street Ry. Co. v. Guthard, 51 Mich. 180.

[231] Morris & Essex R. Co. v. Miller, 30 N. J. Law, 368.

[232] Atlantic & Gulf R. Co. v. Georgia, 98 U. S. 359; State v. Northern Central Ry. Co., 44 Md. 131.

cable to the corporation under its amended charter, unless the amendment expressly waives the right of amendment or repeal.[233]

——**(4) What constitutes a grant of exemption.**—In order that there may be an exemption from taxation, and particularly, in order that there may be an irrevocable exemption, within the constitutional prohibition against impairing the obligation of contracts, it must be granted in clear and unmistakable terms, and it must constitute a part of the contract between the state and the corporation.[234] An intention on the part of the legislature to grant to a corporation an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a charter or act of incorporation, it is to be construed strictly against the corporation and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation.[235] In a Maryland case it was said in substance: To

[233] Louisville Water Co. v. Clark, 143 U. S. 1.

[234] See St. Louis, Iron Mountain & S. Ry. Co. v. Loftin, 30 Ark. 693, affirmed in 98 U. S. 559; Louisville, Cincinnati & L. R. Co. v. Com., 10 Bush (Ky.) 43; and cases in the note following.

A state is not estopped from taxing the property of a corporation by the fact that for many years it has not taxed the same, and that, in reliance upon a supposed exemption from taxation, the corporation has borrowed money and mortgaged its property to secure the same, and agreed to pay all taxes on the mortgage. Hibernian Benevolent Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769.

[235] Providence Bank v. Billings, 4 Pet. 514, 560; Philadelphia, Wilmington & Baltimore R. Co. v. Maryland, 10 How. 376; Delaware Railroad Tax, 18 Wall. 206; North Missouri R. Co. v. Maguire, 20 Wall. 46, 60; Bailey v. Magwire, 22 Wall. 215; Tucker v. Ferguson, 22 Wall. 527; Morgan v. Louisiana, 93 U. S. 217; Memphis & Charleston R. Co., v. Gaines, 97 U. S. 697; St. Louis, Iron Mountain & S. Ry. Co. v. Loftin, 98 U. S. 559; Hoge v. Railroad Co., 99 U. S. 348; Annapolis & Elk Ridge R. Co. v. Anne Arundel County Com'rs, 103 U. S. 1; Memphis Gas Light Co. v. Taxing District of Shelby County, 109 U. S. 398; Memphis & Little Rock R. Co. v. Railroad Commissioners, 112 U. S. 609; Southwestern R. Co. v. Wright, 116 U. S. 231; Vicksburg, Shreveport & Pac. R. Co. v. Dennis, 116 U. S. 665; Chicago, Burlington & K. C. R. Co. v. Guffey, 120 U. S. 569;

make out a claim to exemption from the taxing power of the state, so essential to the support of its government, it is incumbent upon corporations to show that the power to tax has been clearly relinquished by the state; and if this has not been done in clear and explicit terms, or by necessary implication, the question whether or not the exemption has been granted must be resolved in favor of the state.[236]

An exemption from any taxation at all is clearly and unmistakably granted if the charter of a corporation expressly declares that it shall be exempt from liability to taxation. And if a charter prescribes a particular tax to be paid by the

Yazoo & Mississippi Valley R. Co. v. Thomas, 132 U. S. 174; New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 195; Wilmington & Weldon R. Co. v. Alsbrook, 146 U. S. 279.

And in the state courts see, among many cases, Mobile & Spring Hill R. Co. v. Kennerly, 74 Ala. 566; Dauphin & La Fayette Streets Ry. Co. v. Kennerly, 74 Ala. 583; City of Macon v. Central Railroad & Banking Co., 50 Ga. 620; In re Swigert, 119 Ill. 83; State v. Morgan, 28 La. Ann. 482; City of Baltimore v. Baltimore & Ohio R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; State v. Simmons, 70 Miss. 485; City of St. Louis v. Manufacturers' Savings Bank, 49 Mo. 574; Trustees of Phillips Academy v. Exeter, 58 N. H. 306, 42 Am. Rep. 589; People v. Commissioners of Texas, 82 N. Y. 459; Roosevelt Hospital v. City of New York, 84 N. Y. 108; Bank of Pennsylvania v. Com., 19 Pa. St. 144; Iron City Bank v. City of Pittsburgh, 37 Pa. St. 340; City of Richmond v. Richmond & Danville R. Co., 21 Grat. (Va.) 604.

See, also, People v. Watseka Camp Meeting Ass'n, 160 Ill. 576; People v. Chicago Theological Seminary, 174 Ill. 177; Com. v. Masonic Temple Co., 87 Ky. 349; Kentucky Central R. Co. v. Com., 87 Ky. 661; Clark v. Louisville Water Co., 90 Ky. 515; City of Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am. Rep. 369; Anne Arundel County Com'rs v. Annapolis & Elk Ridge R. Co., 47 Md. 592; Frederick County Com'rs v. Sisters of Charity, 48 Md. 34; City of Baltimore v. Grand Lodge, 60 Md. 280; Frantz v. Dobson, 64 Miss. 631, 60 Am. Rep. 68; Adams v. Yazoo & Mississippi Valley R. Co., 75 Miss. 275; Washington University v. Rowse, 42 Mo. 308; State v. Chicago, Burlington & K. C. Ry. Co., 89 Mo. 523; State Board of Assessors v. Paterson & Ramapo R. Co., 50 N. J. Law, 446; People v. Commissioners of Taxes, 76 N. Y. 64; People v. Commissioners of Taxes, 95 N. Y. 554; People v. Peck, 32 App. Div. 624, 157 N. Y. 51; Hibernian Benevolent Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769; Erie Ry. Co. v. Com., 66 Pa. St. 84, 5 Am. Rep. 351; City of Philadelphia v. Pennsylvania Hospital, 134 Pa. St. 171; City of Memphis v. City Bank of Memphis, 91 Tenn. 574; City of Memphis v. Home Ins. Co., 91 Tenn. 558; Morris v. Lone Star Chapter, 68 Tex. 698; Baltimore & Ohio R. Co. v. Marshall County Sup'rs, 3 W. Va. 319; Weston v. Shawano County Sup'rs, 44 Wis. 242; State v. Anderson, 90 Wis. 550.

[236] Anne Arundel County Com'rs v. Annapolis & Elk Ridge R. Co., 47 Md. 592.

corporation, and expressly declares that it shall be in lieu of all other taxes, this is an exemption from any further or different tax than that prescribed.[237]

On the other hand, however, since an exemption will never be presumed, the fact that the charter of a corporation contains no provision at all for taxation, and that there is no reservation of the power to alter, amend, or repeal the same, does not prevent the state from afterwards taxing the corporation.[238] And the mere fact that the charter of a corporation, or an amendment thereof, provides a certain mode for ascertaining the tax to be paid by a corporation, or specifies a particular rate of taxation, does not exempt the corporation from the power of the legislature to afterwards prescribe a different mode by which the tax will be increased, or from otherwise changing the rate.[239] A provision in the charter of a corporation that it shall pay annually into the treasury of the state a tax of a certain per cent. upon its capital stock, where there is no provision that this shall be in lieu of all other taxes, does not prevent the legislature from afterwards imposing a further or different tax. The provision is only a declaration of the tax payable until a different rate is established.[240]

A provision in a charter that the shares of stock in the corporation shall be taxed a certain amount does not preclude the state from imposing a tax on dividends.[241] And a stipu-

[237] See Dodge v. Woolsey, 18 How. (U. S.) 331; Northwestern University v. Illinois, 99 U. S. 309; State Bank of Ohio v. Knoop, 16 How. (U. S.) 369; Farrington v. Tennessee, 95 U. S. 679; Osborn v. New York & New Haven R. Co., 40 Conn. 491; State v. Butler, 86 Tenn. 614; Franklin County Court v. Deposit Bank, 87 Ky. 370.

[238] Providence Bank v. Billings, 4 Pet. (U. S.) 514; Bank of Pennsylvania v. Com., 19 Pa. St. 144; Portland Bank v. Apthorp, 12 Mass. 252; Com. v. Lancaster Savings Bank, 123 Mass. 493. And see the other cases cited in the second note preceding.

[239] Bailey v. Magwire, 22 Wall. (U. S.) 215; Delaware Railroad Tax, 18 Wall. (U. S.) 206; Union Passenger Ry. Co. v. Philadelphia, 101 U. S. 528, 83 Pa. St. 429; Deposit Bank of Owensboro v. Daviess County (Ky.) 39 S. W. 1030; Erie Ry. Co. v. Com., 66 Pa. St. 84, 5 Am. Rep. 351.

[240] Delaware Railroad Tax, 18 Wall. (U. S.) 206.

[241] State v. Petway, 2 Jones, Eq. (N. C.) 396.

lation that a street-railroad company shall pay the city annually a real-estate tax does not exempt the company from the power of the city to impose a license or franchise tax.[242] A provision that a street-railroad corporation shall pay a certain license tax on each car run by it does not prevent the legislature from afterwards requiring it to pay a larger license tax.[243] And the fact that the charter of a water or gas company imposes restrictions as to the amount it may charge consumers, or the city in which it is located, does not exempt it from the subsequent imposition of a license tax.[244]

The question whether a legislative grant to a corporation of the rights and privileges of another corporation includes an exemption from taxation enjoyed by the latter will be considered in treating of the transfer of exemptions.[245]

——**(5) Constitutional exemption.**—Exemptions are sometimes given by the constitution itself, but generally it is left for the legislature to make provision on the subject within the limitations prescribed by the constitution. A constitutional provision that the legislature may exempt certain property, or the property of certain corporations, from taxation, is not self-executing. It merely authorizes the legislature to create the exemption, and there is no exemption until the legislature has acted in pursuance of such authority.*

——**(6) Consideration for exemption.**—As was stated in a former section, in order that the state may be bound by a grant of exemption from taxation, there must be some consideration for the grant. There is a sufficient consideration if the exemption is granted in the charter of the corporation, or in a general law in force at the time the charter is granted

[242] New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192.

[243] Union Passenger Ry. Co. v. Philadelphia, 101 U. S. 528. And see Frankford & Philadelphia Passenger Ry. Co. v. City of Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; Johnson v. City of Philadelphia, 60 Pa. St. 445.

[244] Memphis Gas Light Co. v. Taxing District of Shelby County, 109 U. S. 398.

[245] See infra, this section (9).

* People v. Anderson, 117 Ill. 50; Congregation of United Brethren of Salem v. Forsyth County Com'rs, 115 N. C. 489. And see Sanitary District v. Martin, 173 Ill. 243; Wagner Free Institute v. Philadelphia, 132 Pa. St. 612, 19 Am. St.

and accepted, for the corporation furnishes a consideration in assuming the duties and obligations imposed by the charter, and presumably the state receives a consideration therefrom.[246] The state may also receive a consideration for an exemption from taxation granted after the corporation has been created, as where a corporation accepts an amendment of its charter binding it to pay a certain sum, or perform certain services, in lieu of taxation.[247] A statute, however, passed after a corporation has been created, and exempting it wholly or partially from taxation, without the payment of any consideration or the assumption of any new burden by the corporation, is a mere gratuity on the part of the state, and the exemption may be revoked at any time.[248]

——(7) What corporations are entitled to the exemption.—To encourage and aid charitable and educational institutions, and to encourage manufacturing, etc., general laws have been enacted in some states exempting such corporations from taxation to a greater or less extent. In order that a corporation may claim the right to exemption from taxation under such a statute, it must show that the objects for which it was created or organized are such as to bring it within the class of corporations specified in the statute.[249] Under a statute exempting charitable corporations, benevolent

Rep. 613; Philadelphia v. Barber, 160 Pa. St. 123.

[246] Washington University v. Rouse, 8 Wall. (U. S.) 439; Dodge v. Woolsey, 18 How. (U. S.) 331; Tomlinson v. Jessup, 15 Wall. (U. S.) 454, 2 Smith's Cas. 740; and other cases cited in the notes preceding.

Even when a statute giving an exemption from taxation is in force when a charter is granted and accepted, the exemption may be revoked, if the exemption is in the nature of a mere bounty. East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. (U. S.) 373.

[247] Tomlinson v. Jessup, 15 Wall. (U. S.) 454, 2 Smith's Cas. 740; Northwestern University v. Illinois, 99 U. S. 309; Com. v. Pottsville Water Co., 94 Pa. St. 516.

[248] Rector, etc., of Christ Church v. County of Philadelphia, 24 How. (U. S.) 300; Tucker v. Ferguson, 22 Wall. (U. S.) 527; West Wisconsin Ry. Co. v. Trempealeau County Sup'rs, 93 U. S. 595; Wilmington & Weldon R. Co. v. Alsbrook, 146 U. S. 279, affirming 110 N. C. 137; Pennsylvania R. Co. v. Bowers, 124 Pa. St. 183; City of Philadelphia v. Pennsylvania Hospital, 134 Pa. St. 171.

[249] Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105; Dudley v. Jamaica Pond Aqueduct Corp., 100 Mass. 183; People v. Knickerbocker Ice Co., 99 N. Y. 181.

corporations, educational corporations, etc., no corporation is entitled to the exemption unless it falls within such class.[250] A corporation cannot claim an exemption under a statute exempting manufacturing corporations, unless its business is that of manufacturing.[251]

[250] Ante, § 31(q).

In Massachusetts Society for Prevention of Cruelty to Animals v. City of Boston, 142 Mass. 24, 2 New Eng. Rep. 368, it was held that a society for the prevention of cruelty to animals was a benevolent and charitable corporation within a Massachusetts statute exempting such corporations from taxation.

That a grant of exemption in general terms to charitable corporations does not apply to foreign corporations, see In re Prime's Estate, 136 N. Y. 347.

A corporation may be charitable, within a statute exempting from taxation the property of such corporations, although its benefits do not extend to the general public, but are restricted to its own members and their families. Hibernian Benevolent Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769; City of Indianapolis v. Grand Master, 25 Ind. 518; City of Petersburg v. Petersburg Benevolent Mechanics' Ass'n, 78 Va. 431; Methodist Episcopal Church, South, v. Hinton, 92 Tenn. 188.

It is otherwise, however, where the statute exempts property devoted to the purposes of a "purely public charity," or "public charity." Philadelphia v. Masonic Home of Pennsylvania, 160 Pa. St. 572, 40 Am. St. Rep. 736; Swift's Ex'rs v. Beneficial Society of Easton, 73 Pa. St. 362; Delaware County Institute of Science v. Delaware County, 94 Pa. St. 163; Donohugh's Appeal, 86 Pa. St. 306; Mitchell v. Treasurer of Franklin County, 25 Ohio St. 144; Babb v. Reed, 5 Rawle (Pa.) 150; County of Hennepin v. Brotherhood of Gethsemane Church, 27 Minn. 460, 38 Am. Rep. 298.

An incorporated Masonic lodge is not a public charitable or benevolent institution. City of Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am. Rep. 369.

[251] People v. Knickerbocker Ice Co., 99 N. Y. 181; Nassau Gas Light Co. v. City of Brooklyn, 89 N. Y. 409; Dudley v. Jamaica Pond Aqueduct Corp., 100 Mass. 183; Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105; Com. v. Edison Electric Light & Power Co., 170 Pa. St. 231.

As to what are manufacturing corporations, see ante, § 36(e).

As to the exemption of corporations organized exclusively for manufacturing, under the Pennsylvania statute, see Com. v. Keystone Bridge Co., 156 Pa. St. 500; Com. v. Pittsburgh Bridge Co., 156 Pa. St. 507; Com. v. Thackara Mfg. Co., 156 Pa. St. 510; Com. v. J. B. Lippincott Co., 156 Pa. St. 513; Com. v. Pottsville Iron & Steel Co., 157 Pa. St. 500; Com. v. Juniata Coke Co., 157 Pa. St. 507; Com. v. Savage Fire Brick Co., 157 Pa. St. 512; Com. v. National Oil Co., 157 Pa. St. 516.

Corporations for the purpose of supplying light, heat, and power by means of electricity are manufacturing corporations. Ante, § 36(e). But it is held that they are not within the Pennsylvania statute. Com. v. Northern Electric Light & Power Co., 145 Pa. St. 105; Com. v. Edison Electric Light Co., 145 Pa. St. 131, 27 Am. St. Rep. 683; Com. v. Edison Electric Light & Power Co., 170 Pa. St. 231; ante, § 36(e), note 114.

The fact that a manufacturing corporation has the ancillary power, by express legislative permission, to engage in mining, or any other pursuit, in aid of its manufacturing enterprises, where it has

The various classes of corporations have been considered at some length in a former chapter, and many decisions as to the corporations included in particular classes have been there referred to.[252] The question as to what property of a corporation is exempt under the statutes is considered in the following section.

——**(8) Extent of exemption—(aa) In general.**—A grant to corporations of exemption from taxation is to be strictly construed against a corporation and in favor of the state, and the extent of the exemption is strictly limited by the terms of the grant.[253]

If a grant of exemption is conditional, the conditions must be fulfilled before it will become operative. Thus, if the charter of a railroad company, or some other statute, exempts its property from taxation upon completion of its road, there is no exemption before the road is completed.[254]

——**(bb) Property included.**—If the legislature has lawfully granted to a corporation an exemption of its property from taxation, without restriction, the exemption certainly includes all tangible property, real or personal, which is held by the corporation for the purpose of carrying on the business for which it was created, and which is reasonably necessary for

never used or sought to use such power, does not take it out of the operation of a statute granting exemption from taxation to corporations organized exclusively for manufacturing purposes, and actually carrying on manufacturing within the state. Com. v. Pottsville Iron & Steel Co., 157 Pa. St. 500.

Where the charter of a corporation organized under the law authorizing corporations for manufacturing contains words empowering it, not only to manufacture, but also to engage in a mercantile business, the words empowering it to engage in a mercantile business are mere surplusage. It is a corporation exclusively for manufacturing, and is taxable, under the Pennsylvania statute, on so much of its capital stock only as is invested in the mercantile business. Com. v. Thackara Mfg. Co., 156 Pa. St. 510. And see Com. v. J. B. Lippincott Co., 156 Pa. St. 513.

[252] Ante, §§ 30, 36.

[253] In re Swigert, 119 Ill. 83; Central Railroad & Banking Co. v. Wright, 164 U. S. 327; Young Men's Christian Ass'n of Omaha v. Douglas County (Neb.) 83 N. W. 924; Hibernian Benevolent Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769; and cases cited in the notes following. And see supra, this section, (4). See, however, Milwaukee & St. Paul Ry. Co. v. Crawford County Sup'rs, 29 Wis. 116.

[254] Vicksburg, Shreveport & Pac. R. Co. v. Dennis, 116 U. S. 665.

such purpose.[255] An exemption of the property of a corporation exempts its gross receipts or earnings from carrying on its business.[256] And an exemption, if general, applies to property afterwards acquired by the corporation.[257]

An exemption of particular property, however, cannot be extended by implication to property not clearly included in that specified. Thus, it has been held that an exemption of the capital stock and dividends of a railroad company does not exempt lands granted by the state;[258] and that an exemption of a railroad does not extend to branch lines afterwards constructed.[259] Many other illustrations will be found in the paragraphs following.

——**Franchises.**—A general exemption of a corporation from taxation exempts the franchises of the corporation. Thus, an exemption of a railroad company from taxation, without limitation or restriction, exempts its franchise as well as its real estate, rolling stock, and other tangible property.[260]

——**Exemption of stock or capital stock as an exemption of property.**—It would seem clear that, in the absence of anything to show a contrary intention upon the part of the legislature, an exemption of the stock or capital stock of a cor-

[255] Thus an exemption of the property of a railroad company from taxation exempts, not only its roadbed, but also its workshops, station and engine houses, and all other property used in the operation of its road. Northern Pacific R. Co. v. Carland, 5 Mont. 146.

An exemption of the property of a cemetery company includes the real estate held or dedicated for burial purposes. Metairie Cemetery Ass'n v. Board of Assessors, 37 La. Ann. 32; Proprietors of Swan Point Cemetery v. Tripp, 14 R. I. 199.

An exemption of the property of a religious corporation includes the church property. City of Erie v. First Universalist Church, 105 Pa. St. 278.

[256] Worth v. Wilmington & Weldon R. Co., 89 N. C. 291, 45 Am. Rep. 679; Worth v. Petersburg R. Co., 89 N. C. 301.

[257] Proprietors of Swan Point Cemetery v. Tripp, 14 R. I. 199.

[258] St. Louis, Iron Mountain & S. Ry. Co. v. Loftin, 98 U. S. 559.

[259] Wilmington & Weldon R. Co. v. Alsbrook, 146 U. S. 279, affirming 110 N. C. 137.

[260] Wilmington & Weldon R. Co. v. Reid, 13 Wall. (U. S.) 264; Raleigh & Gaston R. Co. v. Reid, 13 Wall. (U. S.) 269; Worth v. Wilmington & Weldon R. Co., 89 N. C. 291, 45 Am. Rep. 679; Worth v. Petersburg R. Co., 89 N. C. 301.

poration should be held to impliedly exempt the property of the corporation in which its capital stock is invested.[261]

An exemption of stock or capital stock, however, does not exempt the corporation's tangible real or personal property, or its accumulated profits and surplus, if there is anything to show that the legislature may not have intended to use these terms as representing the tangible property.[262] Thus, it has been held that a provision in the charter of a corporation that it shall pay a certain tax annually on each share of its capital stock, in lieu of all other taxes, does not prevent a tax on its surplus and accumulated profits.[263] A provision in the charter of a railroad company that its capital stock shall be forever exempt from taxation, and that the road with all appurtenances shall be exempt for twenty years, and no longer,

[261] See Central Railroad & Banking Co. v. Wright, 164 U. S. 327; State v. Hood, 15 Rich. Law (S. C.) 177; Nichols v. New Haven & Northampton Co., 42 Conn. 103; Hannibal & St. Joseph R. Co. v. Shacklett, 30 Mo. 550; and other cases in the notes following. See, also, ante, § 287(b), for cases sustaining this view by analogy.

[262] Memphis & Charleston R. Co. v. Gaines, 97 U. S. 697; Shelby County v. Union & Planters' Bank, 161 U. S. 149; Central Railroad & Banking Co. v. Wright, 164 U. S. 327.

In the case last cited it was said that while, in the absence of any words showing a different intention, an exemption of the stock or capital stock of a corporation may imply and carry with it an exemption of the property in which such stock is invested, yet, if the legislature uses language at variance with such intention, the courts, which will never presume a purpose to exempt any property from its just share of the public burdens, will construe any doubts which may arise as to the proper interpretation of the charter against the exemption.

[263] In Shelby County v. Union & Planters' Bank, 161 U. S. 149 (distinguishing Farrington v. Tennessee, 95 U. S. 679), it was held that a provision in the charter of a bank that it should pay a certain annual tax on each share of its capital stock, which should be in lieu of all other taxes, while it limited the amount of tax on the shares of stock in the hands of the shareholders, did not prevent a tax upon the capital stock of the bank, or on its surplus and accumulated profits.

In Bank of Commerce v. Tennessee, 161 U. S. 134, where the charter of a bank required it to pay a certain annual tax on each share of its capital stock, and provided that such tax should be in lieu of all other taxes, it was held that the shareholders could not be taxed on their shares. And see Farrington v. Tennessee, 95 U. S. 679.

This decision was modified, on a rehearing, so as to allow taxation of holders of new stock issued by the corporation, under authority conferred by its charter, after the adoption of a constitutional prohibition against exemption from taxation. Bank of Commerce v. Tennessee, 163 U. S. 416.

does not exempt the road and its appurtenances from taxation after the expiration of twenty years, although it may have been purchased with, and may therefore represent, capital.[264] And certainly, where the charter of a corporation exempts its stock from taxation, but contains an express provision against the exemption of its property, the property is taxable.[265]

In South Carolina it was held that an exemption of the "stock" of a railroad company exempted its gross income, as the income was only an accessory of the stock, which was an aggregate of the property and effects of the company.[266] And in Connecticut it was held that an exemption of the "stock and income" of a corporation exempted from all taxation.[267]

——Exemption of property or capital stock as an exemption of shares of stock.—Although there has been some conflict in the decisions on the question, the better opinion and the decided weight of authority is to the effect that, in the absence of anything to show a contrary intention on the part of the legislature, an exemption in terms of the property and capital stock of a corporation, or of either, in the hands of the corporation, exempts by implication the shares of the capital stock in the hands of the stockholders, for, while the shares of stock are in contemplation of law distinct from the property of the corporation in its hands, they represent the property of the corporation, or, rather, the equitable interest of the stockholders therein.[268]

[264] Memphis & Charleston R. Co. v. Gaines, 97 U. S. 697.

[265] Central Railroad & Banking Co. v. Wright, 164 U. S. 327.

[266] State v. Hood, 15 Rich. Law (S. C.) 177.

[267] Nichols v. New Haven & Northampton Co., 42 Conn. 103.

[268] Gordon v. Appeal Tax Court, 3 How. (U. S.) 133; Farrington v. Tennessee, 95 U. S. 679; Tennessee v. Whitworth, 117 U. S. 129, 22 Fed. 75; Johnson v. Com., 7 Dana (Ky.) 338; City of New Orleans v. Carondelet Canal & Nav. Co., 36 La. Ann. 396; Metairie Cemetery Ass'n v. Board of Assessors, 37 La. Ann. 32; Fish v. Branin, 23 N. J. Law, 484; Vail v. Bentley, 23 N. J. Law, 532; Colt v. Powers, 24 N. J. Law, 400; Singer Mfg. Co. v. Heppenheimer, 58 N. J. Law, 633; Worth v. Wilmington & Weldon R. Co., 89 N. C. 291, 45 Am. Rep. 679; Worth v. Petersburg R. Co., 89 N. C. 301; King v. City of Madison, 17 Ind. 48; Richardson v. City of St. Albans (Vt.) 47 Atl. 100.

A provision in the charter of a corporation that it shall pay to the state an annual tax of a certain per cent. on each share of the capital stock subscribed. and that

—**Exemption of shares of stock as an exemption of capital stock, franchises, and property of corporation.**—By the weight of authority, a charter or statutory provision exempting the shares of stock of a corporation from taxation, or imposing a particular tax upon each share of stock, and declaring that it shall be in lieu of all other taxes, exempts, not only the shares of stock in the hands of the stockholders, but also, by implication, the capital stock in the hands of the corporation, and its franchises and tangible property, unless there is something to show an intention to the contrary.[269] The de-

this tax shall be in lieu of all other taxes, exempts the shares of stock in the hands of the stockholders from any further taxation. Farrington v. Tennessee, 95 U. S. 679.

A statute incorporating a railroad company and providing that the capital stock of the company shall be forever exempt from taxation, and that the road with all its fixtures and appurtenances shall be exempt from taxation for twenty years and no longer, exempts the road and its fixtures and appurtenances for twenty years only, but it forever exempts shares of the capital stock of the company in the hands of the holders. Tennessee v. Whitworth, 117 U. S. 129.

In some states there are decisions to the contrary. In Tennessee, for example, it has been held that shares of stock in the hands of stockholders are not exempt from taxation under an exemption of the capital stock of the corporation. "The capital stock and shares of stock," it was said, "are two distinct properties, and an exemption of the one does not thereby necessarily exempt the other, nor the taxation of the latter operate as a tax on the former so as to interfere with its exemption from such burdens." City of Memphis v. Farrington, 8 Baxt. (Tenn.) 539, 547. See, also, Union Bank of Tennessee v. State, 9 Yerg. (Tenn.) 490; State v. Bank of Commerce, 95 Tenn. 221. And see New Orleans v. Citizens' Bank, 167 U. S. 371.

In North Carolina it has been held that shares of stock in the hands of stockholders are not exempt under an exemption of the real property of a corporation. Belo v. Forsyth County Com'rs, 82 N. C. 415, 33 Am. Rep. 688.

In Maryland see Tax Cases, 12 Gill & J. 117; Anne Arundel County Com'rs v. Annapolis & Elk Ridge R. Co., 47 Md. 592; Appeal Tax Court of Baltimore v. Rice, 50 Md. 302.

[269] Bank of Commerce v. Tennessee, 161 U. S. 134; Farrington v. Tennessee, 95 U. S. 679; State of Tennessee v. Bank of Commerce, 53 Fed. 735; Anne Arundel County Com'rs v. Annapolis & Elk Ridge R. Co., 47 Md. 592; Gordon v. City of Baltimore, 5 Gill (Md.) 231; City of Baltimore v. Baltimore & Ohio R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; Tax Cases, 12 Gill & J. (Md.) 117; Scotland County v. Missouri, Iowa & N. Ry. Co., 65 Mo. 123; Singer Mfg. Co. v. Heppenheimer, 58 N. J. Law, 633.

For example, it has been held that not only the stock of a corporation, but also its tangible property, is exempt under a provision that a certain tax imposed on each share of stock shall be in lieu of all other taxes. State of Tennessee v. Bank of Commerce, 53 Fed. 735.

In a late case in the supreme court of the United States it was

cisions to this effect are based upon the theory that the shares of stock in the hands of the stockholders, while in contemplation of law distinct from the capital stock, franchises, and property of the corporation, in fact merely represent the equitable and beneficial interest therein of the stockholders, and that to tax the property of the corporation is to indirectly tax the stockholders on their shares.[270]

——**Right of exemption as determined by use of property or right to hold the same.**—A right to exemption from taxation may be granted to a corporation in such terms as to include all the property of the corporation, without regard to use to which it is put.[271] A grant of exemption, however,

held that a provision in the charter of a bank that it should pay a certain annual tax on each share of its capital stock, which should be in lieu of all other taxes, while it prevented any other or further tax on each share of stock, did not prevent a tax upon the capital stock of the corporation, or on its surplus and accumulated profits. Shelby County v. Union & Planters' Bank, 161 U. S. 149.

Compare Bank of Commerce v. Tennessee, 161 U. S. 134, where it was held that, where the charter of a corporation compelled it to pay an annual tax on each share of its capital stock, and provided that this tax should be in lieu of all other taxes, the shareholders could not be taxed on their stock.

On rehearing, the case last cited was modified so as to allow taxation of holders of new stock issued under the authority conferred by the charter of the corporation after the adoption of a constitutional prohibition against exemptions from taxation; but it was still held that the holders of old stock could not be taxed. Bank of Commerce v. Tennessee, 163 U. S. 416.

In North Carolina it has been held that the franchise of a corporation is not exempt from taxation under an exemption of the shares of its capital stock. Wilmington & Weldon R. Co. v. Reid, 64 N. C. 226; Raleigh & Gaston R. Co. v. Reid, 64 N. C. 155. It was held, however, that a charter provision that a tax of twenty-five cents on each share of stock owned by individuals in a bank should be annually paid into the treasury of the state by the bank, and that it should not be liable to any further tax, exempted the bank from taxation on the land owned and occupied by it for its business. Bank of Cape Fear v. Edwards, 5 Ired. (N. C.) 516.

[270] Anne Arundel County Com'rs v. Annapolis & Elk Ridge R. Co., 47 Md. 592. And see the other cases cited in the note preceding. See, also, ante, § 287(b).

[271] In Town of New Haven v. City Bank, 31 Conn. 106, it was held that, where the charter of a bank exempted its property from taxation, the fact that a building erected by the bank was not needed for the purposes of its business, and was therefore erected in violation of its charter, did not render the building subject to taxation, but that it merely rendered the bank liable to a proceeding by the state for violation of its charter.

And in Osborn v. New York & New Haven R. Co., 40 Conn. 491, it was held that a charter or general law requiring a railroad com-

should never be so construed unless such an intention on the part of the legislature is very clear. Generally such a grant is in express terms limited to property which is held by the corporation for the purposes for which it was created or organized; and, even when there is no such express limitation, a grant of exemption from taxation should not be construed as applying to property of a corporation which is not necessary for or used in the business or object for which it was created,[272] even though it may be possible that it may become necessary at some future time,[273] or though there may be an intention to use it at some future time for purposes which will render it exempt.[274]

Thus, it has been held that an exemption of the property of a corporation from taxation, although in general terms, does not apply to property held, not for use in carrying on

pany to pay a certain tax upon the market value of its capital stock, and upon its funded and floating debt, and providing that this tax should be in lieu of all other taxes, exempted all the property of the corporation from any other taxation, including its real property, whether used for railroad purposes or not. Two judges dissented.

[272] Bank of Commerce v. Tennessee, 104 U. S. 493; People v. Graceland Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32; Camden & Amboy Railroad & Transp. Co. v. Commissioners of Mansfield, 23 N. J. Law, 510; New Jersey Railroad & Transp. Co. v. Newark Collectors, 25 N. J. Law, 315; Morris Canal & Banking Co. v. Cleaver, 46 N. J. Law, 467; Ramsey County v. Chicago, Milwaukee & St. P. Ry. Co., 33 Minn. 537; Lackawanna Iron & Coal Co. v. Luzerne County, 42 Pa. St. 424; and cases cited in the notes following.

See the Illinois case referred to in note 277, infra.

In order that property of a corporation may come within a statute exempting the property of such a corporation from taxation, it need not be necessary, in the sense of "indispensable," to the carrying on of the business of the corporation. It is enough if it be "obviously appropriate and convenient" to enable the corporation to carry into effect the franchise granted. New Jersey Railroad & Transportation Co. v. Hancock, 35 N. J. Law, 537, limiting Camden & Amboy Railroad & Transportation Co. v. Commissioners of Mansfield, 23 N. J. Law, 510.

[273] Ramsey County v. Chicago, Milwaukee & St. P. Ry. Co., 33 Minn. 537. In this case it was held that lands owned by a railroad company, but not occupied by it, were not exempt, although they would probably become necessary at some future time.

[274] Young Men's Christian Ass'n of Omaha v. Douglas County (Neb.) 83 N. W. 924.

Mere temporary use for a purpose not within the exemption, as where a school building is leased during vacation for a boarding house, does not defeat the exemption. Temple Grove Seminary v. Cramer, 98 N. Y. 121.

its business, but for the purpose of selling or leasing the same,[275] or for mere convenience;[276] that an exemption of the property of a railroad company from taxation does not exempt property owned by it, but not necessary for nor used in the operation of its line;[277] that an exemption of manufacturing

[275] Gibbons v. District of Columbia, 116 U. S. 404; Camden & Amboy Railroad & Transp. Co. v. Commissioners of Mansfield, 23 N. J. Law, 510, 57 Am. Dec. 409; New Jersey Railroad & Transp. Co. v. Hancock, 35 N. J. Law, 537; Morris Canal & Banking Co. v. Cleaver, 46 N. J. Law, 467; In re Swigert, 119 Ill. 83; Illinois Central R. Co. v. Irvin, 72 Ill. 456; Richmond & Danville R. Co. v. Alamance County Com'rs, 76 N. C. 212; Mobile & Ohio R. Co. v. Moseley, 52 Miss. 127; Ordinary of Bibb County v. Central Railroad & Banking Co., 40 Ga. 646; State v. Lange, 16 Mo. App. 468; Railroad v. Berks County, 6 Pa. St. 70.

[276] People v. Graceland Cemetery Co., 82 Ill. 336, 29 Am. Rep. 32; Railroad v. Berks County, 6 Pa. St. 70; Lackawanna Iron & Coal Co. v. Luzerne County, 42 Pa. St. 424.

[277] Illinois Central R. Co. v. Irvin, 72 Ill. 456 (where it was held that steamboats owned by a railroad company were not exempt); Railroad v. Berks County, 6 Pa. St. 70; Camden & Amboy Railroad & Transp. Co. v. Commissioners of Mansfield, 23 N. J. Law, 510, 57 Am. Dec. 409 (where it was held that certain dwelling-houses and lots of land owned by a railroad company, and let by it to workmen and mechanics in its employ, were not exempt); In re Swigert, 119 Ill. 83.

In an Illinois case, where the charter of a railroad company, after providing for a limited tax upon its stock, property, and assets, declared that it should be exempt from "all taxation of every kind" except as therein provided, it was held that this broad language should be construed, not alone but with reference to and in connection with the objects and purposes of the whole act; and that, as the company was authorized to acquire and use all such real and other property as might be necessary for the construction of its railway and stations, and such other accommodations as might be necessary to accomplish the objects of its creation, the property intended to be exempted was such as that described, that is, such as was necessary for the construction and operation of its road. It was held, therefore, that a grain elevator erected by the company on its right of way, and leased by it to private parties, who received tolls and compensation for all grain stored therein, was not within the exemption. In re Swigert, 119 Ill. 83.

An exemption of property of a railroad company from taxation does not exempt large tracts of timber lands purchased by it for the purpose of taking timber therefrom, and converting it into ties and lumber for its own use. County of Todd v. St. Paul, Minneapolis & Manitoba Ry. Co., 38 Minn. 163.

It has been held, however, that a statute exempting the property of a railroad company from taxation exempts a tract of gravel land purchased by the company to provide material for the repair of its road, and a branch road connecting such tract with its road. New Jersey Railroad & Transportation Co. v. Hancock, 35 N. J. Law, 537.

It seems that, where the maintenance of inns and boarding houses by railroad companies at their stations for the use of persons arriving and departing on their trains appears to be necessary for

corporations from taxation does not exempt property of such a corporation not used or invested in its manufacturing;[278] that an exemption of the property of a canal company does not exempt property used merely as the residence of its superintendent;[279] and that an exemption of the property of a cemetery company does not apply to land occupied for a residence and garden by its superintendent or sexton.[280] Gas meters, gas mains and pipes of a gas company have been held not to be exempt under an exemption of machinery actually employed and used in the manufacture of gas.[281]

On the same principle, it has repeatedly been held that an exemption of a religious, charitable, or educational corporation from taxation extends to such property only as is held and used by the corporation for religious, charitable, or educational purposes, and does not apply to property held by it merely as a source of revenue.[282] A building used for a school

the safety and convenience of the traveling public, the property employed exclusively for that purpose might be held exempt under a statute exempting property of railroad companies necessarily used in operating their roads. But if such an inn is kept for the accommodation of all persons applying to become guests, and not merely for the accommodation of persons arriving and departing on the company's trains, the property is taxable. In such a case, the courts cannot hold distinct portions of the premises taxable, and the residue exempt, but the whole is taxable. Milwaukee & St. Paul Ry. Co. v. Crawford County Sup'rs, 29 Wis. 116.

[278] Commonwealth's Appeal, 129 Pa. St. 338, 346; Com. v. Mahoning Rolling-Mill Co., 129 Pa. St. 360.

In ascertaining whether one-half of the capital of a manufacturing company is employed in the state in manufacturing, within a statute exempting such corporations from taxation, the capital employed in disposing of the manufactured product in the state is to be included. In re Consolidated Electric Storage Co. (N. J.) 26 Atl. 983.

[279] Morris Canal & Banking Co. v. Cleaver, 46 N. J. Law, 467.

[280] State v. Lange, 16 Mo. App. 468.

[281] Consolidated Gas Co. v. City of Baltimore, 62 Md. 588, 50 Am. Rep. 237.

[282] Presbyterian Theological Seminary of Northwest v. People, 101 Ill. 578; City of New Orleans v. Russ, 27 La. Ann. 413; City of New Orleans v. St. Patrick's Hall Ass'n, 28 La. Ann. 512; Mulroy v. Churchman, 52 Iowa, 238; Fort Des Moines Lodge No. 25, I. O. O. F., v. Polk County, 56 Iowa, 34; Frederick County Com'rs v. Sisters of Charity of St. Joseph, 48 Md. 34; Appeal Tax Court of Baltimore v. St. Peter's Academy, 50 Md. 321; Trustees of Chapel of Good Shepherd v. City of Boston, 120 Mass. 212; People v. Graceland Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32; Trustees of Wesleyan Academy v. Inhabitants of Wilbraham, 99 Mass. 599; Old South Society

or college is exempt although the principal and one of the teachers lives therein with his family. Teachers and necessary servants who occupy rooms in a college building on the premises of college are necessary adjuncts to such an institution, and the building, by reason of such use, does not cease to be used exclusively for college purposes.[283] A corporation

v. City of Boston, 127 Mass. 378; Hennepin County v. Grace, 27 Minn. 503; State v. Ross, 24 N. J. Law, 497; Church of Redeemer v. Axtell, 41 N. J. Law, 117; People v. Brooklyn Assessors, 27 Hun (N. Y.) 559; Humphries v. Little Sisters of Poor, 29 Ohio St. 201; Cleveland Library Ass'n v. Pelton, 36 Ohio St. 253; St. Joseph's Church v. Providence Assessors of Taxes, 12 R. I. 19.

Compare Trustees of Griswold College v. State, 46 Iowa, 275, 26 Am. Rep. 138; and cases there collected.

In Trustees of Phillips Academy v. Exeter, 58 N. H. 306, 42 Am. Rep. 589, it was held that a building used partly as a dormitory and boarding house for students of an academy, and partly as a public house, was not exempt from taxation as "land for the use of the academy."

Such portion of the building of a Young Men's Christian Association as is rented out to others for business purposes is not within a statute exempting property used exclusively for educational, charitable, and religious work, and it can make no difference that the rents and profits therefrom are applied to the work of the association. Young Men's Christian Ass'n of Omaha v. Douglas County (Neb.) 83 N. W. 924.

Ground and buildings owned by a commandery of the Knights Templar, used for the appropriate objects of the organization for not more than four days in each year, and at other times as a summer resort for members of such organizations and their families, but not leased or used for pecuniary profit, are not within a statute exempting all grounds and buildings used for charitable, benevolent, and religious institutions, etc., "devoted solely to the appropriate object of such institutions, and not leased or otherwise used with a view to pecuniary profit." Lacy v. Davis (Iowa) 83 N. W. 784.

It was held in a Massachusetts case that an educational corporation for the purpose of furnishing practical education in agriculture, and giving boys physical development by manual labor, might hold, exempt from taxation, a farm, farm houses, etc., and live stock, where the work on the farm was done, and the live stock tended by the pupils, and the greater part of the product of the farm was consumed by the school, though part of such product and some of the live-stock was sold for cash, or bartered for supplies for the school. Mt. Hermon Boys' School v. Inhabitants of Gill, 145 Mass. 139.

An educational corporation does not forfeit its right to an exemption from taxation by leasing its building for a boarding house during vacation. Temple Grove Seminary v. Cramer, 98 N. Y. 121.

A statute exempting from taxation all property used exclusively for "school" purposes exempts the property of a joint-stock corporation used exclusively for the purposes of a medical college, or for any other institution of learning. Omaha Medical College v. Rush, 22 Neb. 449.

[283] Blackman v. Houston, 39 La. Ann. 592.

which leases property to another, who uses it for a school, cannot claim an exemption of the same from taxation under a statute exempting property used for schools or colleges, etc.[284]

When the purposes for which a corporation may hold land are specified in connection with an exemption for taxation, the exemption extends to such land only as is held for one of the purposes specified.[285]

——(cc) **Taxes included—Assessments for improvements.**—An exemption from all taxation, or from all taxation other than a specified tax, exempts a corporation from local or municipal as well as state taxation.[286] It is well settled, however, that exemption from taxation merely, in general terms, or from county taxes, etc., does not exempt from municipal assessments for public improvements, as for street improvements, sewers, and the like.[287] It is otherwise where the exemption is in terms from

[284] Armand v. Dumas, 28 La. Ann. 403.

[285] Bank of Commerce v. Tennessee, 104 U. S. 493.

[286] People v. Coleman, 121 N. Y. 542; Mobile & Spring Hill R. Co. v. Kennerly, 74 Ala. 566; Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 382; City of Baltimore v. Baltimore & Ohio R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; Johnson Home v. Village of Seneca Falls, 37 App. Div. (N. Y.) 147; Bank of Cape Fear v. Edwards, 5 Ired. (N. C.) 516; City of Richmond v. Richmond & Danville R. Co., 21 Grat. (Va.) 604; Elizabethtown & Paducah R. Co. v. Trustees of Elizabethtown, 12 Bush (Ky.) 233; Anderson County v. Kennedy, 58 Tex. 616.

A corporation has been held exempt from assessments for public improvements,—assessments for constructing sewers,—under a grant of exemption from all and every county or city tax. City of Erie v. First Universalist Church, 105 Pa. St. 278.

A general exemption of a railroad company from "state and county taxes" exempts the company from a tax levied by a county to pay bonds given by it for stock in a railroad company. State v. Hannibal & St. Joseph R. Co., 101 Mo. 136.

[287] Gordon v. City of Baltimore, 5 Gill (Md.) 231; City of Baltimore v. Proprietors of Green Mount Cemetery Co., 7 Md. 517; Sheehan v. Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412; Illinois Central R. Co. v. City of Mattoon, 141 Ill. 32; Illinois Central R. Co. v. Decatur, 147 U. S. 190; Insurance Co. v. City of New Orleans, 1 Woods, 85, Fed. Cas. No. 7,052; In re City of New York, 11 Johns. (N. Y.) 77; Roosevelt Hospital v. City of New York, 84 N. Y. 108; Brightman v. Kirner, 22 Wis. 54; St. Louis Public Schools v. City of St. Louis, 26 Mo. 468; City of St. Joseph v. Hannibal & St. Joseph R. Co., 39 Mo. 476; Broadway Baptist Church v. McAtee, 8 Bush (Ky.) 508, 8 Am. Rep. 480; Elizabethtown & Paducah R. Co. v. Trustees of Elizabethtown, 12 Bush (Ky.) 233; New Jersey Midland R. Co. v. City of Jersey City, 42 N. J. Law, 97; Pray v. Northern Liberties, 31 Pa. St. 69; City of Bridgeport v. New York & New Haven R. Co., 36 Conn. 255, 4 Am. Rep. 63.

See, also, Bloomington Cemetery

both taxes and assessments.[288] An exemption from taxes applies to taxes which have not been collected, though they may have been assessed.[289] And an exemption from assessments applies to assessments not in vogue at the time the charter and exemption were granted.[290] Exemption from state taxation is not included in an exemption from local taxation merely.[291] It has been held that an exemption from county taxes given by the charter of a corporation does not exempt from a school tax imposed after the charter was granted.[292]

——**(9) Transfer of exemption.**—In the absence of express statutory provision to the contrary, exemption of a corporation from taxation is a personal privilege, and is not transferable.[293] It follows that, in the absence of statutory provision, a corporation purchasing the property and franchises of another corporation from it, or under foreclosure of a mortgage given by it, under legislative authority, or at any judicial sale,

Ass'n v. People, 139 Ill. 16; Board of Improvement v. School District, 56 Ark. 354, 35 Am. St. Rep. 108; City of Atlanta v. First Presbyterian Church, 86 Ga. 730 (overruling First M. E. Church, South, v. City of Atlanta, 76 Ga. 181); First Presbyterian Church v. City of Ft. Wayne, 36 Ind. 338, 10 Am. Rep. 35; Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89; Boston Seamen's Friend Soc. v. City of Boston, 116 Mass. 181, 17 Am. Rep. 153; Lake Shore & Michigan Southern Ry. Co. v. City of Grand Rapids, 102 Mich. 374; In re St. Joseph's Asylum, 69 N. Y. 353; Lima v. Cemetery Association, 42 Ohio St. 128, 51 Am. Rep. 809; City of Philadelphia v. Union Burial Ground Soc., 178 Pa. St. 533; New Castle City v. Stone Church Graveyard, 172 Pa. St. 86; Second Universalist Soc. v. City of Providence, 6 R. I. 235; Winona & St. Peter R. Co. v. City of Watertown, 1 S. D. 46; Farwell v. Des Moines Brick Mfg. Co., 97 Iowa, 286.

[288] Proprietors of Swan Point Cemetery v. Tripp, 14 R. I. 199.

[289] State v. Academy of Science, 13 Mo. App. 213.

[290] Proprietors of Swan Point Cemetery v. Tripp, 14 R. I. 199.

[291] Wilkes Barre Deposit & Savings Bank v. City of Wilkes Barre, 148 Pa. St. 601.

[292] Livingston County v. Hannibal & St. Joseph R. Co., 60 Mo. 516.

[293] Memphis & Little Rock R. Co. v. Arkansas Railroad Commissioners, 112 U. S. 609, 1 Keener's Cas. 112; St. Louis, Iron Mountain & S. Ry. Co. v. Berry, 113 U. S. 465; Chesapeake & Ohio Ry. Co. v. Miller, 114 U. S. 176; Com. v. Owensboro & Nashville R. Co., 81 Ky. 572; Arkansas Midland R. Co. v. Berry, 44 Ark. 17; State v. Morgan, 28 La. Ann. 482; State Board of Assessors v. Morris & Essex R. Co., 49 N. J. Law, 193. And see the cases cited in the notes following.

does not acquire by the purchase an exemption from taxation enjoyed by the other corporation.[294]

Where a statute merely authorizes a corporation, as a railroad company, for example, to mortgage its "charter and works," and it executes a mortgage on its charter, rights, privileges, and franchises, an exemption of its property or capital stock from taxation does not pass to a purchasing corporation on foreclosure of the mortgage.[295] And where the property and franchises of a railroad company are sold under a decree to enforce a statutory lien retained by the state upon its property, stock, and franchises, the property is afterwards subject to taxation, although it may have been exempted in the hands of the corporation. The sale does not transfer the immunity from taxation to the purchaser.[296]

This rule applies only in the absence of statutory provision to the contrary. Unless there is some constitutional prohibition in the way,[297] the legislature may transfer a right of exemption from taxation enjoyed by a corporation to another corporation purchasing or otherwise acquiring its property and franchises.[298] But in determining whether a particular statute was intended to have this effect, the general rule applies, that the statute is to be strictly construed in favor of the public and against the exemption.[299] Where the legisla-

[294] See the cases in the note preceding. And see Com. v. Nashville, Chattanooga & St. L. R. Co., 93 Ky. 430; Morgan v. Louisiana, 93 U. S. 217; Louisville & Nashville R. Co. v. Palmes, 109 U. S. 244; Picard v. East Tennessee, Virginia & G. R. Co., 130 U. S. 637; Mercantile Bank v. Tennessee, 161 U S. 161; 1 Keener's Cas. 135; State v. Chicago, Burlington & K C. Ry. Co., 89 Mo 523; State v. Morgan, 28 La. Ann. 482.

[295] Memphis & Little Rock R. Co. v. Arkansas Railroad Commissioners, 112 U. S. 609, 1 Keener's Cas 112.

[296] East Tennessee, Virginia & G. R. Co. v. County of Hamblen, 102 U. S. 273; Wilson v. Gaines, 103 U. S. 417.

[297] Trask v. Magwire, 18 Wall. (U. S.) 391; Louisville & Nashville R. Co. v. Palmes, 109 U. S. 244; St. Louis, Iron Mountain & S. Ry. Co. v. Berry, 113 U. S. 465; Memphis & Little Rock R. Co. v. Arkansas Railroad Commissioners, 112 U. S. 609; Chesapeake & Ohio Ry. Co. v. Miller, 114 U. S. 176. See infra, this section, (b)(1).

[298] Tennessee v. Whitworth, 117 U. S. 129; Atlantic & Gulf R. Co. v. Allen, 15 Fla. 637; State Board of Assessors v. Morris & Essex R. Co., 49 N. J. Law, 193; and other cases cited in the notes following.

[299] Phoenix Fire & Marine Ins. Co. v. Tennessee, 161 U. S. 174.

ture grants to a corporation "all the rights, powers, and privileges" of another corporation, or "all its rights, powers, privileges, and immunities," the language is certainly broad enough to include an exemption from taxation enjoyed by the other corporation; but it has been held that such words alone are not to be construed as including an exemption from taxation, unless there is something else in the statute, or in the circumstances in connection with the statute, to show that the legislature so intended.[300] If it appears from anything else that the legislature intended the exemption to pass to the new company, such words are sufficient to transfer it.[301] It is difficult, if not impossible, to reconcile the decisions in the supreme court of the United States on this question, but the rule above stated is established by the late cases.[302]

What has been said above applies to the consolidation of corporations. The new corporation acquires exemption from taxation enjoyed by the old corporations, provided there is no constitutional prohibition in the way, if the legislature so intends and provides, but not otherwise. The question will be considered in another chapter in treating of the consolidation of corporations.[303]

(10) Abandonment or surrender of exemption.—An exemption from taxation, like any other special franchise or privilege, may be surrendered or abandoned by the corporation, and thereby lost. For example, an irrevocable exemption from taxation is lost if the corporation accepts an amendment of its charter, or other grant, which is offered upon the express condition that it shall thereafter be subject to taxa-

[300] Phoenix Fire & Marine Ins. Co. v. Tennessee, 161 U. S. 174. And see Morgan v. Louisiana, 93 U. S. 217; Memphis & Charleston R. Co. v. Gaines, 97 U. S. 697; Annapolis & Elk Ridge R. Co. v. Anne Arundel County Com'rs, 103 U. S. 1; Wilmington & Weldon R. Co. v. Alsbrook, 146 U. S. 279; Atlantic & Gulf R. Co. v. Georgia, 98 U. S. 359.

[301] Humphrey v. Pegues, 16 Wall. (U. S.) 244; Tennessee v. Whitworth, 117 U. S. 129, 139; Atlantic & Gulf R. Co. v. Allen, 15 Fla. 637; Nichols v. New Haven & Northampton Co., 42 Conn. 103.

[302] Phoenix Fire & Marine Ins. Co. v. Tennessee, 161 U. S. 174, 180, 181.

[303] Post, § 355(e).

tion, or if it accepts an amendment which is granted upon condition that, if it accepts the same, it shall be subject to the provisions of the state constitution, one of which provisions is a prohibition against exemption from taxation adopted since the exemption was granted.[304]

As in the case of other special franchises or privileges, an abandonment or surrender of an exemption from taxation may be implied from long acquiescence in a claim of the right to impose taxes. "If an exemption from taxation," said Mr. Justice Bradley in the supreme court of the United States, "can be lost in any case, by long acquiescence under the imposition of taxes, it would seem that an acquiescence of sixty years, and, indeed, a much shorter period, would be amply sufficient for this purpose, by raising a conclusive presumption of a surrender of the privilege. An easement may be lost by nonuser in twenty years, and even in a less time if it is affected by positive acts of invasion. A franchise may be lost in the same way, nonuser being one of the common grounds assigned as a cause of forfeiture. * * * Exemption from taxation being a special privilege granted by the government to an individual, either in gross, or as appurtenant to his freehold, is a franchise. Nonuser for sixty, or even thirty, years, may well be regarded as presumptive proof of its abandonment or surrender."[305]

—(11) **Extraterritorial effect of exemption.**—Since the statutes of a state can have no effect beyond its territorial limits, except in so far as other states may see fit to recognize them, a charter or statutory provision exempting the prop-

[304] See Citizens' Bank of Louisiana v. New Orleans Board of Assessors, 54 Fed. 73; Hannibal & St. Joseph R. Co. v. Shacklett, 30 Mo. 550; Memphis City Bank v. Tennessee, 161 U. S. 186; Macon & Augusta R. Co. v. Goldsmith, 62 Ga. 463. Compare Nichols v. New Haven & Northampton Co., 42 Conn. 103. See, also, supra, this section, (b)(1), (3).

A corporation may give up its exemption from state taxation by acceptance of an act amending its charter, or conferring new privileges, without surrendering its exemption from county taxation. State v. Hannibal & St. Joseph R. Co., 101 Mo. 136.

[305] Given v. Wright, 117 U. S. 648, 656.

erty or stock of a corporation from taxation cannot be set up in another state to defeat a tax levied by such state upon property situated therein, or upon shares of stock held by residents thereof.[306]

§ 300. Remedies in the case of illegal taxation.

Remedies of corporation.—With respect to the remedies in the case of illegal taxation there is very little to be said that is at all peculiar to corporations. On this subject, therefore, the practitioner is referred to works on taxation.

As a general rule, a corporation cannot maintain a bill in equity to enjoin the collection of an illegal tax, if there is a complete and adequate remedy at law, either by virtue of special statutory provisions, or by virtue of the common law.[307] But such a suit may be maintained if there is no adequate remedy at law, or if it is necessary in order to avoid a multiplicity of suits, or if there is any other recognized ground of equity jurisdiction.[308]

If a tax is unlawfully assessed upon the shares of the stock-

[306] Appeal Tax Court of Baltimore v. Patterson, 50 Md. 354; Appeal Tax Court of Baltimore v. Gill, 50 Md. 377.

[307] See National Commercial Bank v. City of Mobile, 62 Ala. 284, 296; Jones v. Rushville Natural Gas Co., 135 Ind. 595; Oliver v. Memphis & Little Rock R. Co., 30 Ark. 128; Railroad Tax Cases, 92 U. S. 576; Hibernian Benevolent Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769.

[308] Wright v. Southwestern R. Co., 64 Ga. 783; Hills v. Exchange Bank, 105 U. S. 319; First Nat. Bank of Omaha v. Douglas County, 3 Dill. 298, Fed. Cas. No. 4,809.

In a Georgia case it was held that a court of equity had jurisdiction of a bill in equity to restrain the collection of illegal taxes assessed against a railroad company, on the following grounds: First, because exactions were pressed upon it in the form of annual taxes, inconsistent with and violative of its chartered rights, and destructive of its franchise; secondly, because the exactions might be repeated and suits and costs multiplied; thirdly, because the company was misled by the action of the comptroller and a legal fraud perpetrated upon it; fourthly, because of mistake caused by the comptroller's conduct; and, fifthly, because the numerous questions made as to different parts of the road, and the liability of each portion or branch, most of them dependent for adjudication on separate charters and amendments, and other questions in respect to other items of property in and out of the state, and in what degree and how connected with the road, and whether liable or not to be taxed, made the case so complicated that a court of equity could better unravel it than a court of law. Wright v. Southwestern R. Co., 64 Ga. 783.

holders in a corporation, as in the case of an illegal state tax upon shares in a national bank, and the corporation is required to pay the tax and collect it from the stockholders or deduct it from their dividends, the corporation occupies such a position that it may maintain a suit in equity in its own name, on behalf of the stockholders, to enjoin collection of the tax.[309] "The bank," it has been said, speaking of a national bank, "is so far the trustee of the stockholders, and the custodian of the dividends that it is entitled to maintain the bill. It might be subjected to great annoyance by stockholders, who denied the legality of the tax, and gave the bank notice that it would pay it at the peril of being sued by them. It is certainly no hardship to permit the whole question to be litigated in a single action."[310] The corporation, if it sues at all in such a case, must sue in equity. It cannot sue at law.[311] When the bank sues to enjoin collection of an excessive tax on the shares of its stock, it is only entitled to a decree as to the excess.[312] A bank may file a petition under the state law for a reduction of an excessive tax on its shares.[313]

An injunction against the collection of an illegal tax will not be granted where the tax is only illegal because it is excessive, unless the corporation pays or offers to pay so much as is admittedly due.[314]

A corporation may maintain an action at law to recover back an illegal tax paid by it, if the payment was not volun-

[309] Cummings v. Merchants' Nat. Bank of Toledo, 101 U. S. 153; Hills v. Exchange Bank, 105 U. S. 319; Evansville Bank v. Britton, 105 U. S. 322; City Nat. Bank v. City of Paducah, 2 Flip. 61, Fed. Cas. No. 2,743; National Albany Exchange Bank v. Wells, 18 Blatchf. (U. S.) 478, 5 Fed. 248; Whitney Nat. Bank v. Parker, 41 Fed. 402; Knopf v. First Nat. Bank of Chicago, 173 Ill. 331. Contra, First Nat. Bank of Hannibal v. Meredith, 44 Mo. 500; Farmers' Nat. Bank of New Jersey v. Cook, 32 N. J. Law, 347; National Commercial Bank v. City of Mobile, 62 Ala. 284, 296; Waseca County Bank v. McKenna, 32 Minn. 468.

[310] City Nat. Bank v. City of Paducah, 2 Flip. 61, Fed. Cas. No. 2,743.

[311] Lindsay v. First Nat. Bank of Shreveport, 156 U. S. 485.

[312] Whitney Nat. Bank v. Parker, 41 Fed. 402.

[313] National Bank of Commerce v. City of New Bedford, 155 Mass. 313.

[314] Smith v. Rude Bros. Mfg. Co., 131 Ind. 150.

tary, but it cannot recover a tax which it has paid voluntarily.[315]

Remedies of stockholders.—Ordinarily, stockholders in a corporation cannot sue in their own names to enjoin the collection of an illegal tax against the corporation, but the suit must be brought by the corporation.[316] A stockholder may maintain such a suit, however, on behalf of himself and such other stockholders as may choose to come in, if the corporation wrongfully refuses to resist payment of the tax.[317]

Stockholders in a national bank, or in any other corporation, may individually maintain a suit in equity to enjoin collection of an illegal tax on their shares, if there is no adequate remedy at law; but an injunction will not be granted unless they pay so much of the tax as is legal.[318]

If they have been compelled to pay an excessive tax without an opportunity to have the same corrected, they may sue to recover back the excess, but they cannot recover if the payment was voluntary.[319]

[315] Louisville & Nashville R. Co. v. Com., 89 Ky. 531. See works on taxation.

[316] Post, § 536 et seq.

[317] Dodge v. Woolsey, 18 How. (U. S.) 331; post, § 542.

[318] See Cummings v. Merchants' Nat. Bank of Toledo, 101 U. S. 153; Albany County Sup'rs v. Stanley, 105 U. S. 305; Hills v. Exchange Bank, 105 U. S. 319; First Nat. Bank of Toledo v. Treasurer of Lucas County, 25 Fed. 749; Frazer v. Siebern, 16 Ohio St. 614; Rosenberg v. Weekes, 67 Tex. 578; Griffith v. Watson, 19 Kan. 23.

[319] See Stanley v. Supervisors of Albany, 121 U. S. 535; Exchange Nat. Bank v. Miller, 19 Fed. 372; City of Indianapolis v. Vajen, 111 Ind. 240; Mackay v. City & County of San Francisco, 113 Cal. 392; Louisville & Nashville R. Co. v. Com., 89 Ky. 531.

One who feels himself aggrieved by overvaluation of his property for purposes of taxation, and who does not resort to the tribunal created by the state for the correction of errors in assessments before levy of the tax, cannot maintain an action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation. His remedy is in equity to enjoin the collection of the illegal excess upon payment or tender of the amount due upon what is admitted to be a just valuation. Williams v. Supervisors of Albany, 122 U. S. 154; Stanley v. Supervisors of Albany, 121 U. S. 535.

Where bank stock owned by one person is levied upon and advertised for sale to pay another's taxes, when there is no law making such stock distrainable for taxes, and the owner of the stock, with full knowledge of all the facts, and in possession of the stock, pays the tax, although under protest, the payment is voluntary, and cannot be recovered back. Sowles v. Soule, 59 Vt. 131.

If stock is sold to satisfy an illegal tax, an action of trover or case will lie to recover damages.[320]

§ 301. Power to compel payment of back taxes.

The state may compel a corporation to pay taxes for past years, or "back taxes," as they are called, if there was a valid law under which they should have been paid, where payment has been evaded by the corporation, or where the tax officers have failed to levy and collect the same through negligence or mistake of law or fact. Where the charter of a railroad company required it to pay an annual tax not exceeding a certain share of its capital stock, whenever its annual profits should exceed six per cent., and the company evaded payment for twenty-five years, it was held that it could be compelled to pay for all these years.[321] This decision was put upon the ground that the state's right to the taxes was a contract right, the tax being imposed by the charter of the corporation as the price to be paid by it or its shareholders for the franchise. But the right of the state to assess taxes against a corporation for past years during which it has escaped taxation is not limited to such cases. It extends as well to taxes otherwise imposed.[322] The tax officers, however, cannot assess back taxes without legislative authority.[323]

Where the auditor general and state treasurer have settled an account for taxes between the state and a corporation, and the taxes thus assessed have been paid by the corporation, and there is no clerical mistake, so that the account becomes closed, under the provisions of a statute, at the end of a year from the date of such payment, it cannot be reopened, and additional taxes assessed against the corporation, on the ground that the

[320] Sprague v. Fletcher, 69 Vt. 69.

[321] State v. Seaboard & Roanoke R. Co., 52 Fed. 450.

[322] McVeagh v. City of Chicago, 49 Ill. 318; Williams v. Supervisors of Albany, 122 U. S. 154; State v. Simmons, 70 Miss. 485; State v. Pors (Wis.) 83 N. W. 706. It is within the power of the legislature to cure an omission or a defective performance of such of the acts required by law to be performed by local boards in the assessments of taxes as could have been in the first place omitted from the requirements of the statute, or which might have been required to be done at another time than that named in it; provided, always, that intervening rights are not impaired. Williams v. Supervisors of Albany, 122 U. S. 154.

[323] Staten v. Savannah, Florida & W. Ry. Co., 111 Ga. 803.

public officers erroneously determined that the corporation was not subject to such taxes, unless there is some express statutory authority for such proceeding.[324] Such action cannot be sustained on the ground that the taxes were omitted by mistake, or on the ground that the omission was due to laches or neglect on the part of the public officers chargeable with the duty of assessing taxes, for which the state should not suffer.[325]

[324] Com. v. Pennsylvania Co., 145 Pa. St. 266.

In this case the auditor general and state treasurer in 1872 and 1873, construing the charter of a corporation in a certain way, assessed against it a small capital stock tax, which was paid. From 1874 to 1887 the taxing officers in their annual settlements with the company, acting under an official opinion of the attorney general construing the charter in another way, refrained from assessing any such tax. In 1888 the auditor general and state treasurer stated an account against the corporation by which, disregarding the action of their predecessors, and adopting a third construction of the charter, they charged it with taxes on capital stock for the years from 1874 to 1887, and additional sums on account of such taxes for the years 1872 and 1873. It was held that such action was beyond the power of the officers, and the account between the state and the corporation for the years mentioned had been closed.

And see City of Philadelphia v. Ridge Avenue Passenger Ry. Co., 142 Pa. St. 484.

[325] On this point it was said in the case first above cited: "When one fails by some forgetfulness, or inadvertence, to do what he intended to do, or knew should be done, such failure may be said to happen by mistake. But, if one does just what he intended to do, in the way he intended after careful deliberation and competent legal advice, his action is in no sense due to mistake. His conclusion may be wrong, but it has been considerately reached. His action may do some one an injustice, but, if so, it is not the result of accident. Before such action can be reversed or set aside it is necessary to revise the conclusions on which it rested. An error in computation, or in transcribing, may be corrected, and such correction merely gives effect to the purpose of him by whom the error was made. He failed to do what he intended, when he made the error, and its correction is in aid of his own execution of his intent. But the auditor general did not intend to assess a capital-stock tax against the company. He investigated the question, and decided that the company was not liable, and proceeded to state the taxes due from it just as he believed they should be stated. His decision cannot be reversed by his successor, in the manner now attempted. His successor is not bound by it. He may adopt a different rule, for his own guidance in the current business of his office, but he cannot go back and do over again the finished work of his predecessors. If he could do what is proposed here, he could go back to the foundation of the commonwealth. If he could thus overhaul accounts, his successor could do the same thing, and so on indefinitely. The time would never come when a corporation, or other taxpayer, could feel safe, or be beyond the reach of an officer or clerk disposed to make him trouble, or to speculate on his fears or his dread of litigation." Com. v. Pennsylvania Co., 145 Pa. St. 280, 281, distinguishing Haehmlen v. Com., 13 Pa. St. 617.

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